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No. 35

IN THE

# Supreme Court of the United States

October Term 1941

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THE UNITED STATES OF AMERICA,
Petitioner.

v.

ALICE GRAY KALES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

---

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

---

### *Opinions Below*

The opinion of the District Court (R. 32-38) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 43-49) is reported in 115 F. (2d) 497.

### *Jurisdiction*

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940 (R. 43). The Government's petition for rehearing was denied on December 10, 1940 (R. 50). Certiorari was granted by this Court April 28, 1941 (R. 51). Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### *Questions Presented*

(1) Whether the Court below erred in concluding that taxpayer's letter dated March 23, 1925 (R. 14-18), a duplicate of which was filed with the Commissioner of Internal Revenue, constituted an informal claim for refund for 1919 income taxes paid to Collector John A. Grogan in 1920.

(2) If said letter constituted a claim, whether it was duly amended on September 24, 1928.

(3) If said letter constituted a claim, whether it was merged with and extinguished by a judgment against Collector Fred L. Woodworth for 1919 income taxes overpaid to him in 1925.

(4) Whether the Court below erred in concluding that taxpayer's cause of action was not barred by any statute of limitations.

## GENERAL STATEMENT OF CASE

The Brief for the Government is, in our view, inaccurate in so many respects in its statement of the facts that, while we regret the necessity, we feel that we should not only specifically refer to the inaccuracies and omissions but should also submit our own statement of the facts. We first list the errors and omissions referring to the pages of the brief on which they are found and then follow with our Statement of the Facts.

### *Errors and Omissions*

1. Page 2. The statement that taxpayer in a prior suit was awarded a large refund of income taxes "resulting from a recomputation of her profit" upon her sale

of Ford stock and in this suit seeks an additional refund for the same year based upon a further recomputation of that profit is not accurate. The earlier suit was for the refund of a jeopardy deficiency assessment resulting from the Department fixing a new base value of the stock lower than that which had been set by it to induce the sale by the taxpayer. This present suit is for an overpayment of her original tax and is due to the determination of the base value by the Board of Tax Appeals at a higher figure than originally set by the Department.

2. Page 4. The ten numbered paragraphs did assert the illegality of the deficiency assessment but the last two also gave notice of a claim for refund or the original assessment of 1920. Not all of these paragraphs asserted that the previous valuation could not be reopened. They asserted other grounds of invalidity. It is this so called letter of protest which the taxpayer contends is an informal claim of refund.

3. Page 5. Reference to the Commissioner's letter of April 6, 1925 (R. 18) is omitted.

4. Page 5. The inference at the top of this page is that the contentions in paragraphs 9 and 10 were limited to the litigation in the taxpayer's own case whereas there was no such limitation. She notified the Commissioner of her claim if the stock was revalued by a competent authority in *any* case or *any* further proceeding.

5. Page 5. Reference to the hearings on the claim, the conferences with the Internal Revenue Department and correspondence therewith and the information conveyed to the taxpayer that it had been recommended that the claim be allowed is omitted.

6. Page 13. There can be no question but that the taxpayer treated the March 23, 1925 letter as an informal claim for refund. It was filed immediately before the expiration of the statute of limitations. It was so treated in her correspondence with the Department. Her position that it was an informal claim was the subject of briefs to, and hearing in, the Department. She filed an amended claim specifically referring to it (R. 19-21). Reference to these facts is omitted in the brief.

7. Page 15. Taxpayers' position was that the Government could not reopen the Roper valuation and that valuation "should stand". At the same time, she said that this valuation was substantially less than the fair value of said stock on the basic date and the stock was grossly undervalued by the Department and that she should recover a refund from the Collector to whom the tax was paid or from the Government of the United States. The brief states taxpayer's position inaccurately.

8. Page 15. Taxpayer not only filed on June 4, 1925 a formal claim for refund of the jeopardy assessment, she filed on September 21, 1928 an amended refund claim based on the revaluation of the stock at $10,000 per share.

9. Page 16. It may be true that the "central ground of protest was that the Commissioner had no power to reopen the valuation." But that was only one of the grounds set forth in the March 23, 1925 letter.

10. Page 17.. Paragraphs 9 and 10 do not disclose the "one basic contention" that the Commissioner had no authority to reconsider a determination made by his predecessor in office. The language of these paragraphs is clear to the effect that they deal also with a

claim other and further than that for the jeopardy assessment. The judgment for the refund of the latter assessment did not give the taxpayer everything she demanded in the March 23, 1925 letter.

11. Page 18. The letter of the Commissioner of June 4, 1935 (R. 24) did not assert that the refund claim of September 21, 1928, was not timely. The letter of August 20, 1935 (R. 25, 26) expressly refers to taxpayer's letter dated March 23, 1925 and filed March 24, 1925 as a "claim for refund." Reference to these facts is omitted in the brief.

## *Statement of the Facts*

**(Page references are to the Transcript of Record in this Court.)**

Mrs. Kales, the taxpayer, was on and prior to March 1, 1913, the owner of 525 shares of stock in the Ford Motor Company.

On May 19, 1919, Daniel C. Roper, Commissioner of Internal Revenue, determined the March 1, 1913 value of the Ford Motor Company stock to be $9,489.34 per share (R. 8) and thereafter taxpayer sold her 525 shares of stock for $12,500 per share (R. 9). As stated on page 3 of the Government's brief, taxpayer in filing her 1919 income tax return computed the profit on this sale upon the basis of the March 1, 1913 value of $9,489.34 so fixed by Commissioner Roper and paid Collector Grogan a tax in the amount of $1,216,086.26.

Collector Grogan went out of office on, to-wit, November 27, 1921, and died on, to-wit, November 30, 1923, and was succeeded in office by Collector Fred L. Woodworth who went out of office on August 15, 1933, and who is still out of office (R. 9).

On March 13 or 14, 1925 (R. 10), nearly five years after taxpayer's 1919 income tax return had been filed, and shortly before the period of the statute of limitations was about to expire, the then Commissioner of Internal Revenue, on his own initiative, and without notice or hearing, fixed a new March 1, 1913 value on the Ford Motor Company stock of $2,364.00 per share, and made a jeopardy assessment against taxpayer in the amount of $2,627,309.05. This tax was paid under protest to Collector Fred L. Woodworth on March 24, 1925 (R. 10).

At the same time that the jeopardy assessment was levied against the taxpayer, deficiencies approximating $31,000,000 were assessed against certain other Ford Motor Company stockholders who brought action before the Board of Tax Appeals which, thereafter, on May 5, 1928, determined that the correct March 1, 1913 value of the Ford Motor Company stock was $10,000 per share. (See *James Couzens*, 11 B. T. A. 1040, 1044.) The Government took no appeal from this decision.

Taxpayer's protest upon payment of the jeopardy assessment to Collector Fred L. Woodworth was in the form of a letter dated March 23, 1925 (R. 14-18), a duplicate copy of which was mailed to the Commissioner of Internal Revenue and received by him on March 24, 1925. The present controversy centers around paragraphs 9 and 10 of this letter which dealt, not with the jeopardy assessment being simultaneously paid to Collector Woodworth, but with the overpayment of income taxes made nearly five years prior thereto to Collector Grogan (R. 17-18). The taxpayer claims, and the Court below concluded, that these paragraphs constituted a sufficient informal claim for refund under the facts and circumstances in the case. Paragraphs 9 and 10 read as follows:

"9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Tax Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913, was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

"10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Depart-

ment as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a re-valuation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

Thereafter, on to-wit, September 24, 1928, and prior to any action having been taken thereon by the Commissioner (R. 11), taxpayer filed a formal amendment bearing the jurat date of September 11, 1928, to this informal claim (R. 19), specifying the March 1, 1913 value of $10,000 per share as fixed and determined by the United States Board of Tax Appeals in the *James Couzens* case, supra, computing her profit on that basis and making claim for the amount of income taxes theretofore overpaid by her in 1920 to Collector Grogan in the amount of $195,710.44. (In certain of the correspondence (R. 24, 25) the filing date of the formal amendment was given as September 21, 1928. There was only one formal amendment.)

On June 4, 1925, taxpayer filed a separate claim for refund for the $2,627,309.05 paid under protest to Collector Woodworth (R. 10). Suit was thereafter brought against him in the District Court resulting in a directed verdict in favor of the taxpayer for the $2,627,309.05. On appeal, this judgment was affirmed, the Court holding that the successor Commissioner lacked authority to reopen the original assessment based on Commissioner Roper's March

1, 1913 value of the Ford Motor Company stock. *Woodworth v. Kales*, 26 F. (2d) 178 (C. C. A. 6th)*

The matter of the refund of the $195,710.44 overpaid in 1920 to Collector Grogan was held under consideration by the Bureau of Internal Revenue for nearly seven (7) additional years after the amendment of September 24, 1928, or a total of approximately eleven (11) years. On June 5, 1929, taxpayer's counsel was given an opportunity to present oral argument "on the pending refund claim filed by Alice G. Kales" (R. 22). A hearing on the merits of the claim was held on June 13, 1929 (R. 11) and a voluminous brief was filed supporting taxpayer's contention that the letter of March 23, 1925 was a sufficient informal claim for refund of the $195,710.44 (R. 29). At this hearing, the General Counsel for the Bureau stated that he was satisfied that the protest (the letter of March 23 ,1925) was sufficient to constitute an informal claim for refund and that it was filed within the statutory period (R. 20). Thereafter, under date of June 21, 1929, taxpayer's counsel prepared and forwarded to the General Counsel a Supplemental Brief wherein it was stated (R. 29):

> "We understand that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund; that the amendment to this informal claim for refund filed on September 11, 1928, sufficiently complies

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* Counsel for the Government in a note on page 16 of his brief, says:

> "It seems clear that her victory in that case (*Woodworth vs. Kales*, 26 F. (2d) 178) was wholly unwarranted, for it has since been repeatedly held that the determination of the Commissioner of Internal Revenue can be reopened at any time."

citing *Burnet v. Porter*, 283 U. S. 230; *Commissioner v. Newport Industries*, 121 F. (2d) 655. This statement is, in itself, not warranted. The opinion of the Sixth Circuit in 26 F. (2d) 178 has not been criticized. It was not referred to in the *Newport Industries* case, 121 F. (2d) 655. It was referred to in the case of *McIlhenny v. Commissioner*, 39 F. (2d) 356, which is cited in the *Burnet case*, but the facts in the *McIlhenny case*, as well as those in the *Newport Industries case*, distinguish those cases from the *Kales case*.

> with the requirements of the statute and the regulations so that it is now admitted that the taxpayer's claim for refund is proper both as to time of filing and formal requirements. The sole question is as to whether or not the proceedings in the District Court were of such a nature that this claim for refund cannot now be allowed * * *."

This Supplemental Brief was retained by the Bureau of Internal Revenue and no exceptions were ever taken to the foregoing statements (R. 29).

On January 27, 1933, taxpayer's counsel had a conference with a member of the staff of the General Counsel of the Bureau of Internal Revenue who again reiterated that they were satisfied that the informal claim was filed in time and that it was good as an informal claim and that the delay in acting was due to the fact that the Bureau was considering certain claims of taxpayer's brothers (R. 30). The brothers' claims were thereafter reduced to judgment in the Court of Claims on May 3, 1937, in the case of *Goodenough v. United States*, 19 Fed. Supp. 254.

On February 7, 1933, taxpayer's attorneys were advised "that early attention would be given to Mrs. Kales' claim" (R. 23). In response to letters inquiring as to the status of taxpayer's claim, counsel were advised on July 31, 1933, that it was hoped "that a conclusion may be reached in the matter at an early date" (R. 23) and again on February 9, 1935, "that every effort" will be made to reach a conclusion and dispose of the matter within a few weeks" (R. 24).

There is no dispute but that all these negotiations, hearings and correspondence dealt with the claim for the $195,710.44 and with no other claim.

Thereafter under date of June 4, 1935, taxpayer received a letter (Exhibit "I" of Amended Petition, R. 24)

from the Commissioner of Internal Revenue, wherein the position was taken that the payment of the judgment for $2,627,309.05, which taxpayer had recovered against Collector Woodworth, precluded the Bureau from giving further consideration in any respect to the matter of her income tax liability for the taxable year 1919. The Commissioner did not repudiate the position taken by the General Counsel six years prior thereto that the letter of March 23, 1925, constituted a sufficient informal claim for refund. On June 18, 1935, taxpayer's attorney conferred with a member of the staff of the General Counsel's office with respect to the Commissioner's letter of June 4, 1935, and said member expressed surprise at the form of the letter and its contents and stated that he had previously recommended to the General Counsel that taxpayer's claim for refund be allowed (R. 30).

Thereafter, taxpayer wrote to the Commissioner under date of August 5, 1935 (R. 24), stating that she construed the Commissioner's letter of June 4, 1935, to be a disallowance of her claim for refund. This information was of importance to taxpayer so that she might know when the statute of limitations on starting suit would commence to run. Taxpayer's final communication from the Commissioner prior to starting the suit at bar was the Commissioner's letter of August 20, 1935 (R. 25), and in this letter the Commissioner took the position that taxpayer had filed suit upon the claim filed in 1925, and after obtaining judgment for the full amount claimed, had attempted on September 21, 1928, to "amend the claim for refund, which gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year." He concluded that "the refund claim filed in 1925 was merged into the judgment secured by you against the United States and you were, therefore, precluded from filing an amendment to

the earlier claim which had been finally adjudicated" (R. 26).

The Commissioner was acting under a serious misapprehension of the facts, and since the Government relies heavily on the merger theory first enunciated in the Commissioner's letter of August 20, 1935, it seems appropriate to point out some of these errors at this time.

In the first place, he was wrong in assuming that the March 24, 1925, claim was the basis of the suit in the prior litigation. Taxpayer filed a separate refund claim for the $2,627,309.05 paid to Collector Woodworth on June 4, 1925 (Par. 3 [i] of Amended Petition, R. 10). This claim was reduced to judgment but no attempt was made to amend it to secure an additional refund. The September 21, 1928, amendment was expressly captioned "Amendment to Claim for Refund Filed March 24, 1925" (R. 20).

The Commissioner was also wrong in stating that taxpayer had secured a judgment against the United States. The prior judgment was against Collector Woodworth which fact, as will be pointed out in our argument, is of vital importance in determining whether the present action is barred by the prior adjudication.

It should be pointed out that, in his letter of August 20, 1935, the Commissioner did not repudiate the position taken years before by the General Counsel, that the letter of March 23, 1925, constituted a claim for refund. On the contrary, the Commissioner expressly treated it as a claim on which the prior suit had been based. It was the 1928 amendment which he claimed the Bureau had not considered or treated as a claim.

Taxpayer started suit on July 7, 1936, but was required to amend her Petition by the District Court's order of October 19, 1936 (R. 7) granting the Government's motion to strike a portion of the original Petition. On December

4, 1936, the United States Attorney moved to dismiss the Amended Petition on alternative grounds (R. 26); and as one of the grounds, asserted for the first time during the eleven (11) years the matter had been under consideration, that taxpayer's letter of March 23, 1925, "neither constitutes nor includes a claim for refund." In the alternative, it was asserted that even if the letter constituted a claim for refund, it had been rejected by the Commissioner's letter of April 6, 1925 (R. 18). As a second alternative, it was asserted that if the March 23, 1925, letter were to be construed as constituting a claim for refund, said claim became extinguished by virtue of its merger with the judgment rendered against Collector Woodworth.

The disposition of the Motion to Dismiss was held under advisement by the District Court and an order of dismissal was finally entered February 27, 1939. In the appeal to the Sixth Circuit, the only issues raised by the United States were whether taxpayer's letter of March 23, 1925, constituted an informal claim for refund, and if so, whether it had been rejected by the Commissioner's letter of April 6, 1925. The United States did not press its argument that the claim in question had been merged with and became extinguished by the judgment against Collector Woodworth. The Circuit Court of Appeals in the last paragraph of its opinion (R. 49) said "the Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it on a ground *abandoned* in this action."

In its brief before this Court, the Government does not claim that the Commissioner's letter of April 6, 1925 (R. 18), constituted a rejection of taxpayer's informal claim for refund.

# ARGUMENT

## *Introductory*

We do not disagree with the Government's statement on page 12 of its brief that every suit for refund must be founded upon a valid and timely claim for refund. We note that it admits that the last date for filing a timely claim in this matter was April 14, 1925.

It is taxpayer's position that the Court below correctly held that her letter of March 23, 1925, filed with both the Collector and Commissioner of Internal Revenue constituted a timely informal claim for refund for the taxes overpaid Collector Grogan in 1920; that it was duly amended on September 24, 1928; that it did not become merged with or extinguished by the judgment against Collector Woodworth for the taxes overpaid him in 1925 and that the former judgment against the Collector is in no respect res judicata of the claim, demand and issue in the present suit.

## I.

### *The Court below correctly held that taxpayer's letter of March 23, 1925, constituted an informal claim for refund of taxes overpaid in 1920 to Collector Grogan.*

There is no dispute in the record that the Commissioner treated taxpayer's letter of March 23, 1925, as a sufficient informal claim for refund over a period of many years and finally disposed of the matter on entirely different grounds.

It was alleged (Amended Petition 3 [n], R. 12) that "the Bureau through its General Counsel and its officers and agents had always treated the amendment (of September 24, 1928) and the refund claim of March 24, 1925, as claims from the time they were filed." Hearings on the merits were held during which the General Counsel stated he was satisfied that the letter was sufficient to constitute an informal claim for refund (R. 29); no exceptions were ever taken to the statements in taxpayer's supplemental brief "that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund." It is also clear from the correspondence that it was assumed that taxpayer had a refund claim pending. In fact, a member of the General Counsel's staff advised taxpayer's counsel that he had recommended that the claim for refund be allowed (R. 30).

The matter was finally disposed of on other grounds. After suit was started and reached the United States Attorney's hands, it was for the first time alleged that the entire proceedings were abortive because the letter of March 23, 1925, was not sufficient to constitute a claim.

Even in the brief before this Court, the Government does not argue that the Commissioner was misled in any manner by the form of taxpayer's letter, or that he did not in fact always understand it to constitute a claim.

We submit that the Court below correctly construed the letter of March 23, 1925 as constituting an informal claim for refund, and that any imperfections that it might have contained were long since waived by the Commissioner.

**(a) The word "claim" is interpreted liberally in determining the application of statutes of limitation.**

As pointed out in *Factors' & Finance Co. v. United States*, 56 F. (2d) 902, 905 (Court of Claims), affirmed 288

U. S. 89, there are two groups of statutes relating to refund claims: (1) Those giving the Commissioner jurisdiction to refund overpayments and (2) Section 3226 Revised Statutes (set forth in full in Appendix, page 70).

Included in the first group of statutes are those provisions found in all the Revenue Acts making it mandatory upon the Commissioner to make refunds, if upon examination of any return it appears that an amount of income tax has been paid in excess of that properly due provided "a claim therefor is filed by the taxpayer" within the proper time.

Section 252 of the Revenue Act of 1918 (Appendix page 70) applies to the case at bar. The corresponding sections of the subsequent revenue acts are Section 252 of the Revenue Act of 1921; Section 281 of the Revenue Act of 1924; Section 284 of the Revenue Act of 1926; Sections 322 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and the 1939 Internal Revenue Code.

Section 252 of the Revenue Act of 1918 does not define the term "claim" nor specify its form or contents. It does not require the "claim" to be under oath or to set forth a statement of facts or the theory upon which it is based. Consequently, as will be more fully set forth later in this brief, the courts have construed the word "claim" very broadly and have held informal, defective or blanket claims contained in letters, briefs, protests or even waivers of the statute of limitations, to be sufficient to give the Commissioner jurisdiction to make refunds.

However, if the Commissioner should fail to make refund, an unsworn, defective, informal claim, unless amended, would not support a court review. Section 3226 Revised Statutes precludes suit until a claim for refund has been filed with the Commissioner of Internal Revenue "according to the provisions of law in that regard, and

the regulations of the Secretary of the Treasury established in pursuance thereof." The various regulations in effect prior to May 1, 1929, did require refund claims to be under oath and to set forth all the facts relied upon. Art. 1036, Reg. 45; Art. 1036, Reg. 62; Art. 1306, Reg. 65; Art. 1304, Reg. 69; and Art. 1254, Reg. 74. The regulations were amended March 27, 1929, effective May 1, 1929, by T. D. 4265 C. B. VIII-1 page 110, after the filing of taxpayer's amendments to her refund claim on September 24, 1928, in which it was provided that a claim would not be considered defective solely by reason of the fact that it was not on Form 843.

The courts have been extremely liberal in interpreting the word "claim" in determining the application of statutes of limitation and also, as pointed out on page 19 of the Government's Brief, this Court has gone far in permitting amendments. This is not surprising, for if the United States has collected excess taxes from its citizens, it is only right that the amount overpaid should be refunded. The reason is stated in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67. In note No. 2 the court referred to official statistics and said:

> "Official statistics indicate that 'eighty-five 20/100 per cent of all the overassessments *are attributable* to clerical or bookkeeping adjustments or *to causes beyond the control of either the Treasury or the taxpayer, that is to adjustments after the payment of taxes based upon causes which could not fairly be considered prior to the payment.*' * * * These statistics, covering adjustment of taxes under the Act of 1928, give support to the conclusion that in determining the application of a statute of limitations *the word 'claim' should be interpreted with reasonable liberality.*"

As applied to taxes, it was ruled in 14 *Opinions Attorney General* 615, as early as 1873, as follows:

> "Whenever a bona fide litigant or claimant brings his cause before a tribunal having jurisdiction, I apprehend that such proceeding even when 'fatally' informal *is usually held to be an action or claim* so far at least as to be a foundation for an amendment and thus be capable of becoming perfect by relation to its original institution and so of defeating a plea of 'limitation' which otherwise might avail the defendant."

See also the Solicitor's 1924 opinion, L. O. 1116, C. B. III-1 p. 350, 359, where an unsworn letter to the Commissioner asking reconsideration of a claim was held to meet the requirements of an informal claim.

The sufficiency of a claim does not necessarily depend upon the language used. Circumstances surrounding the filing of the document alleged to constitute a "claim," such as the amount of information already possessed by the Commissioner and the manner in which it is treated by him, have great weight.

Thus in *Bonwit Teller & Company v. United States*, 283 U. S. 258, at pages 263-265, a waiver of the statute of limitations and a transmittal letter reading "In accordance with your request, we enclose you herewith waiver," were held to constitute a claim. After the statute of limitations had run, a formal claim was filed. It would seem hard to spell out a claim for refund from these facts if the word "claim required an express demand for the return of the tax or a call for action on the part of the Commissioner. The Court pointed out that before the waiver was filed the Bureau had made a jeopardy assessment and thereafter

determined that there was an apparent overassessment. The Court said at pages 263-5:

> "• • • The Government's point comes down to the question *whether the waiver and the letter transmitting it together with what went before amounted to the filing of a claim* within the meaning of the statute.
>
> • • • • •
>
> "• • • Plaintiff's prompt execution and return of the waiver and the bureau's acceptance of it clearly show that both considered the facts already found and reported a sufficient basis for plaintiff's claim.
>
> • • • • •
>
> *"The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested,* and was not misled or deceived by plaintiff's failure to file formal claim, *and was fully warranted in holding that the waiver and earlier documents were sufficient.*

In *Lasher v. United States*, 65 Ct. Claims 295, 6 Am. Fed. Tax Rep. 7448, a letter of protest was held to constitute a claim entitling taxpayer to interest on a refund. The factual situation was in many respects similar to the case at bar. After one additional assessment, a second was proposed; and in a letter of protest dated August 26, 1922, general reference was made to the failure to allow, as a deduction from gross income of an estate, the Federal Estate taxes which had accrued. Attached to the letter was an affidavit in which it was stated on information and belief that the taxpayer "has paid an aggregate amount of income and surtaxes for 1917, 1918 and 1919 which exceeds the aggregate amount of her actual tax liability for those years," but there was no demand for any specific sum. Thereafter the Commissioner determined the exact amount of the overpayment but refused to refund the statutory interest on the grounds that there had been no claim for refund.

The court held that the letter constituted a claim, and allowed recovery, saying:

> "This determination was in strict accord with plaintiff's contention in the letter of August 26, 1922, *except only that plaintiff did not make, and in the nature of the transaction could not at that time have made, a demand for a specific sum.* • • •
>
> "By the letter of August 26, 1922, which contained all the essential information required to be set out in the official forms, plaintiff stated the specific ground upon which she claimed that her taxes for 1918 had been overpaid. Regardless of the form, it was the assertion of a right intelligibly expressed, and it was considered and allowed by the commissioner."

In *Jones v. United States*, 5 F. Supp. 146 (Court of Claims), the taxpayer filed an unsworn letter with the Collector on March 12, 1923, stating that in view of the fact that the statute of limitations was about to run that "*protest is hereby made* to the method used by the department in the computation of our invested capital." The letter concluded with a request for consideration. The word "refund" was not used in the letter, nor was the amount to be repaid stated. Several years later formal claims were filed.

The court held that the letter of March 12, 1923, although unsworn, constituted an informal claim for refund under the circumstances, pointing out that it was filed after all of the taxes had been paid; that it made reference to the statute of limitations; that it was inended as a claim; that it stated the grounds; and that it put the Commissioner upon notice within the time he had authority to make refunds. Not having been rejected, it was subject to amendment notwithstanding the fact that the statute of limitations had run on filing claims.

**(b) Under the circumstances in the case at bar, Paragraphs 9 and 10 of taxpayer's letter of March 23, 1925 constituted a present informal claim.**

In view of all the circumstances surrounding the filing of her letter of March 23, 1925 with the Commissioner, i.e. the fact that it was filed after the tax here in question had been paid; that the Government had delayed until the statute of limitations was about to expire before making the jeopardy assessment based on a lower March 1, 1913 value than that fixed by Commissioner Roper; that the correct March 1, 1913 value was not at that time known and it was impossible for taxpayer to fix in dollars and cents the amount of the overpayment which had previously been made to Collector Grogan in the short time in which she had to act, we submit that paragraphs 9 and 10 of said letter constituted an informal claim for refund.

Judged by the results which it accomplished, it was clearly the equivalent of a formal claim, for it resulted in hearings on the merits, numerous conferences with the Bureau's General Counsel and was finally disposed of on the alleged legal grounds that it had been merged in a prior judgment against Collector Woodworth. In view of the practical construction placed upon this letter by the parties themselves, we submit that the construction placed upon it by the court below should stand.

This is warranted when the entire letter is considered. Paragraphs 1 to 8 set forth certain reasons for protesting against the payment of the $2,627,309.05 jeopardy assessment being made simultaneously. These paragraphs could not constitute a claim for refund, informal or otherwise, for that amount, since refund claims cannot be made until after the tax in question has been paid. *Kings County Savings Institution v. Blair*, 116 U. S. 200, 205; *Rock Island, Arkansas & Louisiana R. R. Co. v. United States*, 254 U. S. 141. Taxpayer, recognizing this principle, properly stated

in the closing paragraph that she "will make claim for the refund of the deficiency tax herewith paid," and thereafter did so.

Paragraphs 9 and 10 unlike the preceding eight paragraphs dealt, however, with the original tax which had been overpaid nearly five years before, although at the time the letter was written, the exact amount of overpayment was unknown since the true March 1, 1913 value of the Ford Motor Company stock had not been fixed. Paragraph 9 commences "this taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government" etc., thus indicating that a different and distinct issue was being raised. If the paragraph was merely intended to supplement the protest to the Collector contained in the preceding eight paragraphs, there would have been no occasion for giving notice to the Commissioner or to the United States.

Paragraphs 9 and 10 do have this bearing upon the validity of the jeopardy assessment which was being presently protested. If, as taxpayer set forth in these paragraphs, the March 1, 1913 value was higher than Commissioner Roper's valuation of $9,489.34 per share and she had already overpaid the amount of her 1919 income taxes, it would follow that the jeopardy assessment was therefore illegal, irrespective of whether the Commissioner had authority to make it. These paragraphs therefore constituted a present assertion based on taxpayer's existing rights.

Paragraphs 9 and 10 differ in some respects. In Paragraph 10 taxpayer advised the Commissioner that "if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale and she will claim the right to a

refund of said tax to the extent of such excess." Taxpayer relied on this paragraph in her amendment of Sept. 24, 1928.

Paragraph 9, on the contrary, deals with the situation in the event the Department, Board of Tax Appeals or any court should hold that the former assessment made by Commissioner Roper should be set aside and vacated and that the March 1, 1913 value of the Ford Motor Company stock as fixed by him should be "vacated, set aside, reopened or reversed and the contentions of this taxpayer as heretofore set forth be overruled."

Paragraph 9, however, clearly states taxpayer's contention that the $9,489.34 March 1, 1913 value of the Ford Motor Company stock fixed by Commissioner Roper was substantially less than the fair market value on the basic date, that the stock was greatly undervalued, that the fair value of the stock as of March 1, 1913 was greatly in excess of $9,489.34, and that therefore taxpayer should recover from the Collector of Internal Revenue or from the United States the portion of the tax theretofore paid as may be found to be excessive when the fair value as of March 1, 1913 shall have been determined.

Paragraph 10 also states as grounds for the prior overpayment, the fact that the stock was grossly undervalued and that the taxpayer "was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale."

We submit, therefore, that these paragraphs were not a "vague alternative suggestion" as argued on page 21 of the Government's brief; that the letter could qualify as a claim for refund of the taxes here involved and not as a claim for refund of the deficiency itself since the two payments were separate and the letter was filed after the payment of the original tax but simultaneously with the payment of the deficiency tax.

Counsel for the Government also argue on page 21 that the use of language, conditional and couched in the future tense, amounts to no more than a warning that taxpayer might file a claim in the future. The courts, however, have frequently held that the use of the future tense with reference to past events is no legal impediment to the assertion of a present claim, and is more grammatical than substantial in a legal sense (see infra, pages 30 and 31).

It was only natural that taxpayer should employ the future tense in these paragraphs. When the March 23, 1925 letter was written taxpayer could not fix the true March 1, 1913 value of the Ford Motor Company stock, and thus determine in dollars and cents the exact amount of the refund due her. The use of the future tense was in contemplation of the making of a subsequent formal amendment to taxpayer's informal claim.

The Government is in no position to complain. It had itself fixed the March 1, 1913 value prior to the sale of taxpayer's stock in 1919 and taxpayer had no occasion to obtain any data with which to fix the March 1, 1913 value at any time prior to the making of the jeopardy assessment in March 1925.

Between the date of the jeopardy assessment and the expiration of the statute of limitations there was no time to do this. The valuation of the Ford stock presented a very complicated problem. It required the opinion of experts, accountants, engineers, economists, statisticians and bankers. The stock was unlisted and there were no sales as of the basic date. To determine its March 1, 1913 value, data regarding its earnings, its tangible and intangible property, the position of the Ford Motor Company in the automotive industry, the business risks then existing, etc., would have been necessary. The magnitude of the task will be appreciated by reference to the Board's findings of facts and the

voluminous record in *James Couzens*, 11 B.T.A. 1040. The Government, on page 16 of its Petition for Certiorari in the case at bar, gave this as a reason for granting the writ.

It should also be borne in mind that when Mrs. Kales' letter of March 23, 1925 was written, deficiencies had been assessed against other Ford stockholders amounting to almost $31,000,000 (*James Couzens*, 11 B.T.A. 1040, 1044). It is a matter of judicial record that on March 23, 1925 representative of the Philip Gray Estate (Mrs. Kales' deceased brother) filed a claim of abatement alleging that the $9,489.34 March 1, 1913 value of the Ford Motor Company stock "was not excessive but was less than the fair and actual value of said stock on that date." *Goodenough v. United States*, 19 F. Supp. 254 (Court of Claims Finding No. 13 page 257). It could therefore be reasonably expected on March 23, 1925, that some of the other Ford stockholders would apply to the Board of Tax Appeals or some other tribunal, open up the whole question of the March 1, 1913 value of the Ford stock, and obtain a final determination of that value.

Mrs. Kales decided, however, upon the procedure of paying the jeopardy assessment and bringing suit against Collector Woodworth for its recovery. The entire jeopardy asessment could be recovered in such a suit merely upon proof that the March 1, 1913 value of the Ford Motor Company stock was at least equal to $9,489.34 per share. The question of a higher valuation would not be directly in issue since no part of the tax overpaid to Collector Grogan could have been recovered in the suit against Collector Woodworth.

Under such circumstances, it was but natural that, instead of stating in her letter of March 23, 1925, an arbitrary value, or at least one which would have necessarily been only her opinion, Mrs. Kales should preserve her rights by the general assertion that she had already overpaid her

1919 income taxes and was entitled to a refund, and then wait until the March 1, 1913 value had been fixed by some tribunal of competent jurisdiction, before advising the Commissioner of the exact amount of the excess payment. We have previously pointed out that a demand for the refund of a specific sum is not necessary, especially when the nature of the transaction is such that it could not have been made at the time the claim had to be filed. See *Lasher v. United States*, supra, page 19.

Moreover, the case at bar differs from all other cases that have come to our attention in that the crucial question of fact, to-wit, the March 1, 1913 value of the Ford Motor Company stock, was one on which the Government had more information than the taxpayer.

The question had come up repeatedly in the Commissioner's office during the period 1919 to 1925. Commissioner Roper originally determined the March 1, 1913 value on May 19, 1919, to be $9,489.34 per share (Amended Petition 3(b), R. 8) after sending Talbert, Acting Deputy Commissioner, and four assistants to Detroit to check the books of the Ford Motor Company and to examine into its affairs for the express purpose of ascertaining the March 1, 1913 value of its stock. The mass of evidence then obtained is set forth in the *James Couzens* case, 11 B.T.A. 1040, at pages 1047 to 1053. The question was reconsidered during 1922 (11 B.T.A. 1066 to 1071) and again in March, 1925 (11 B.T.A. 1083). He was still investigating when he made the $2,627,309.05 jeopardy assessment against taxpayer (R. 30) based on a March 1, 1913 value of $2,534.00 per share.

Subsequent to the filing of taxpayer's letter of March 23, 1925, the Commissioner fixed the March 1, 1913 value at $3,547.84. *James Couzens*, 11 B.T.A. at 1092; *Woodworth v. Kales*, 26 F. (2d) 178, 179 (Note No. 2). He must have known that since a revision of the $9,489.34 Roper valuation

downward resulted in a deficiency, any upward revision would fix the amount of an overassessment, and this, of course, happened.

As pointed out by the court in *Woodworth v. Kales*, 26 F. (2d) 178, 179 (Note No. 2), the various March 1, 1913 values of the Ford Motor Company stock employed by the Commissioner were determined by the use of formulas and that "obviously the result can be varied at the pleasure of the inventor of formulas." The Commissioner must have been aware of the possibility that a different formula might be used, which would result in a valuation higher than $9,489.34 per share originally determined.

Under the foregoing circumstances, taxpayer was faced with a practical exigency when her letter of March 23, 1925 was prepared and filed; that nothing was then settled as to the March 1, 1913 value of the Ford Motor Company stock. Paragraphs 9 and 10 of said letter should, therefore, be construed in a practical manner and as constituting the assertion of a present claim.

Such a construction is in accordance with the practical interpretation placed upon the letter by both parties continuously since it was filed, and under the principle of the *Bowcit Teller & Company* case, supra, page 18, it is sufficient as an informal claim since it was understood and treated as such by the Commissioner.

Taxpayer considered her letter to include a claim for refund for in filing her amended claim on Form 843 she captioned it "Amendment to Claim for Refund Filed March 24, 1925" and expressly set forth Paragraph 10 of the letter as constituting the original claim. She caused a copy of the letter to be filed with the Commissioner which was entirely unnecessary if taxpayer had believed that she was merely protesting the payment of the jeopardy assessment. Furthermore, Paragraph 10 shows

that taxpayer was aware of the statute of limitations. It was imperative that a claim be filed or her right to a refund would soon be barred and there was no object in delaying the filing of an original claim until some future time.

The Commissioner also understood the letter of March 23, 1925, to constitute a refund claim and treated it as such. Allegations in the amended petition must be accepted as true on a motion to dismiss. *United States v. City Savings Bank & Trust Co.*, 73 F. (2d) 486 (C. C. A. 6th). In paragraph 3 (n) of the amended Petition (R. 12) it is alleged that

> "The Bureau, through its General Counsel and its officers and agents, had always treated said amendment and the refund claim of March 24, 1925, as claims from the time they were filed."

If the Commissioner had not considered the letter as a sufficient informal claim, it would seem logical that he would have promptly disposed of the refund on that ground and on the grounds of the statute of limitations. The Amended Petition shows, however, that after some six years of consideration, the Commissioner finally took the position in his letter of August 20, 1935 (R. 25-26) that "*the refund claim filed in 1925* was merged into the judgment secured by you." Attention is also specifically called to page 29 of the record where it appears that at the hearing on the merits held on June 13, 1929, the General Counsel "stated that they were satisfied that said protest was sufficient to constitute an informal claim for refund and that it was filed within the statutory period," and that thereafter, on June 21, 1929, a supplemental brief was filed expressly calling attention to these admissions. Furthermore (R. 30) a member of the General Counsel's staff even went so far as to recommend that the claim for refund be allowed.

**(c) The use of the future tense in Paragraphs 9 and 10 of said letter was at most a grammatical defect. The letter was more than a warning that taxpayer might file a claim in the future.**

It is well settled that a present claim can be made even though the word "will" is employed, particularly when the party to whom the claim is made already has some knowledge of the facts on which it is based.

Thus in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, a shipment of flour had been damaged in transit and one of the defenses pleaded was that no claim for damages had been made within four months after delivery as required by the bill of lading. The lower court held that no claim had been filed. The shipper had, however, sent a telegram within the four-month period, stating "*We will make claim* against railroad * * *."

After holding that the provisions in the bill of lading were valid and could not be waived by the carrier, the Court held that the telegram constituted a claim. It said on pages 197-198:

> "But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation *for the reason that it appears that notice of the claim was in fact given. It is true that in the statement made by the Court of Appeals it is said that so far as appears from the record 'no claim was filed by the shipper.'* We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted fac[illegible] in detail showing that the shipper (having mad[illegible] investigation in response to the communication of the traffic manager of the Railway Company) had telegraphed to the latter on June 7, 1910, only five

days after the arrival of the goods at destination, as follows: '*We will make claim against railroad for entire contents of car at invoice price.* Must refuse shipment as we can not handle.' * * * Granting that the stipulation is applicable and valid, it does not require documents in a particular form. *It is addressed to a practical exigency and is to be construed in a practical way.*"

In *E. H. Emery & Co. v. Wabash R. Co.*, 183 Ia. 687, 166 N. W. 600, various shipments of strawberries had been damaged. The bill of lading required claims to be made within four months after delivery, non-compliance with which was pleaded as a defense. As to one shipment, plaintiff had written as follows:

> "Agent Wabash, City—Dear Sir: This is to notify you that, in due time, *we will file a claim against your company for damages* * * *."

As to another shipment, plaintiff wrote:

> "Agent Wabash, City—Dear Sir: This is to advise you that *we will file claim* against your company for damages * * *."

As to another shipment, plaintiff wrote:

> "Agent Wabash, City—Dear Sir: This letter is to notify you that *there will be a claim filed* for insufficient icing and poor refrigeration on car berries A. R. T. 9068, arriving at 2:45 p. m., May 22, 1913. * * * *In due time we will file a claim* against your road as the delivering line."

No other claim in writing was presented within the four-month period. The Court said:

> "It will be noted that the written notices or letters delivered to the agent by the plaintiff spoke in the future tense. Two of them stated that claim will be filed 'in due time'. *The argument for the appellee is concentrated largely upon this feature of the form of the notice, in that it indicated a purpose to file*

*in the future a more formal claim, and that it thereby indicated that the plaintiff itself did not deem the writing as a sufficient compliance with the requirements of the B/L.* The plaintiff did later in each case file a somewhat more formal claim, but not within four months. This argument necessarily assumes that the claim made might have been sufficient if it had spoken in the present tense. *We are impressed that such distinction is more grammatical than substantial in a legal sense.* The B/L specified no details as to the form in which a claim should be made. • • • We are relieved, however, from the necessity of passing upon the question as an original one. We deem the question here presented as having been clearly determined by the United States Suprme Ccurt in *Georgia Railway Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. • • •

"In that case as in this the telegram spoke in the future tense. The amount of damages was not specified. No more formal claim than the telegram was made within four months. • • •

"• • • We hold, therefore, that the requirement of the B/L relating to the method and time of making claim for damages was sufficiently complied with."

Similar rules are laid down in *Fisk Rubber Co. v. New York, N. H. & H. R. R.*, 240 Mass. 40, 132 N. E. 714; *New Orleans & N. E. R. Co. v. Wood*, 112 Miss. 614, 73 So. 615; *Cudahy Packing Co. v. Bixby*, 199 Mo. App. 589, 205 S. W. 865 (certiorari denied 248 U. S. 577); *Stiles v. Ocean S. S. Co.*, 34 F. (2d) 627 (C. C. A. 2). See also *The West Arrow*, 80 F. (2d) 853 (C. C. A. 2), where letters containing among others, the phrase "The parties interested *will hold* the steamer responsible for the damage", were held definite enough as a declaration demanding payment, although the amount claimed could not be supplied at the time because it was unknown.

In *George Moore Ice Cream Co., Inc., v. Rose*, 289 U. S. 373, the Circuit Court of Appeals for the Fifth Circuit was reversed. As appears from the lower court's opinion, 61 F. (2d) 605, a claim was filed on the last day before the statute expired. It gave notice of specific errors in adjustment of invested capital and also stated there had been an erroneous assessment of net income. It included a statement that "*if* the audit now being made reflects a different result *it will be submitted* as additional *evidence*." After the statute of limitations had run, detailed statements were filed as amendments. The Circuit Court of Appeals held that this statement did not indicate a purpose to challenge the exacted tax on a ground other than the one based on the elimination of assets from taxpayer's invested capital. This Court, however, held at page 384, that the notice as to the erroneous assessment of net income was subject to amendment. This conclusion would seem to clearly justify the filing of the September 24, 1928, amendment in the case at bar so as to include matters which were still under investigation by the Commissioner at the time the statute of limitations expired.

We submit, therefore, that counsel have reached an unwarranted conclusion on page 22 of their brief that the statements with reference to the original tax are no more significant or operative as a claim than those made in regard to the additional tax, and that taxpayer failed to file any claim for refund of the original tax until 1928.

On page 23 of the Government's brief, certain cases are cited for the proposition that a protest with a notice that a refund will be sought or a statement of intention to file a claim has always been considered not to constitute a "claim" which would satisfy the statutory requirement. They are all distinguishable from the case at bar.

*Art Metal Construction Co. v. United States*, 47 F. (2d) 558 (C. C. A. 2), did not involve the sufficiency of any let-

ter as constituting an informal claim. There the taxpayer filed a formal claim without stating any grounds. In the sentence following the first part of the quotation cited on page 23 of the Government's brief, the Court pointed out a distinction which applies to the case at bar. The Court said at page 559:

> "The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim, should something turn up, either because of a change in the rulings of the courts, or of the Department, or for any other reason which might lead him to suppose that he could get back what he had already paid. *We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. In such cases we may assume arguendo that much latitude would be allowed,* not only to amend as to the amount demanded, but to amplify the grounds of the claims, and perhaps to set out others."

In the case at bar, taxpayer's letter of March 23, 1925 certainly went much farther than to advise "the Commissioner that the taxpayer had come to doubt the validity of any part of the tax." We submit that the *Art Metal Construction Co.* case is authority in support of taxpayer's contentions that her letter was a sufficient informal claim for refund.

*Ordway v. United States,* 37 F. (2d) 19 (C. C. A. 2), also, we submit, is an authority in favor of the present taxpayer. There certain unpaid attorney fees had been disallowed as a deduction and a letter was written to the Commissioner expressing an intention of filing a claim for refund for estate taxes after the fees had been allowed and paid. At the date the letter was written, no claim had in fact come into being, so that the letter could not possibly constitute

a claim for refund. The Court pointed out that if a claim had arisen at the time of the letter, it might overlook all defects. It said at *page 21:*

> "The letter of October 3, 1921, cannot be treated as the presentation of a claim to the commissioner. *If the only difficulty had been lack of proper form, or if any claim had at that time arisen, we might overlook all defects.* But the letter of October 3, 1921, was no more than a statement of the plaintiff's position and a forecast of what he proposed to do when his claim should come into being. It did not present or even purport to present a claim, and, indeed, it could not do so, for no claim then existed."

In the case at bar, taxpayer's claim had in fact arisen long prior to the letter of March 23, 1925.

*Dysart v. United States*, 95 F. (2d) 652 (C. C. A. 8), presented a similar question to that in the *Ordway* case and is distinguishable on other grounds as well. There taxpayer's final and untimely claim for refund presented the new theory, to-wit, that an estate was entitled to the deduction of the amount of statutory executor's fee in the amount of $37,557.60 which might have been allowed, whereas the amount actually allowed and paid was only $7,500. In connection with timely claims on other items the taxpayer had reserved the right to file further claim when the amount of the commissions had been determined and paid. As the Court stated on page 654 of its opinion, it was not required to pass upon the question of whether the prior notice tolled the time for filing a claim for refund for the amount actually allowed and paid until the amount of the fees was subsequently paid. The claim before the Court was not of that character. The case is not applicable to the case at bar, since Mrs. Kales did not shift to new grounds in the amendment to her original informal claim.

In *Semmes Motor Co. v. United States*, 67 Court of Claims 631, the taxpayer filed a protest against a proposed assessment of additional taxes, but, as the court pointed out, neither in express terms nor by implication did the plaintiff assert any claim for refund. This, of course, is not true of Mrs. Kales' letter.

In *Mutual Trust Life Insurance Co. v. United States*, 45 F. (2d) 288 (Court of Claims), it appeared that the taxpayer inserted a protest by way of indorsement upon the face of its income tax return, and, in paying the tax shown by the return, wrote to the Collector protesting the payment of a portion of it. Such a letter of protest could not be considered a claim for the reason that payment is a necessary precedent to the making of a claim. In Mrs. Kales' case, paragraphs 9 and 10 of her letter of March 23, 1925, referred to the tax paid on her original return some five years before and had no reference to the jeopardy assessment which was being paid simultaneously with the filing of the letter. We see nothing in the decision of the above case which is in any way applicable to the case at bar.

In *Heberlein Patent Corporation v. United States* (D. Ct. S. D. N. Y. not officially reported) U. S. T. C. 38-1, par. 9182, the letter in question was merely a protest against the accompanying payment of additional 1926 and 1927 income taxes then being made to the Collector. It did not refer to payments made in a prior year, and hence could not be construed as a claim. Furthermore, it was clear that the taxpayer did not treat the letter as a claim for, unlike the case at bar, the formal claims, which were thereafter filed on January 24, 1931, were drawn as original claims and not as amendments to the letter, which was not referred to. In addition, it appears from the opinion that the claims referred to in the letter, as well as the 1931 formal claims, were allowed July 16, 1931. The suit was apparently brought on new grounds asserted in new claims filed in 1932 and 1933 as amendments to the 1931 claim.

The Court was clearly correct in holding that after a claim has been allowed in full it was no longer subject to amendment.

*Waters v. United States*, 12 F. Supp. 658 (W. D. Mich.) (affirmed per curiam C. C. A. 6), is distinguishable on several grounds. The trial court expressly found that there was no evidence that either the taxpayer or the Commissioner regarded the letter as other than a statement of intention to file a claim; the letter read: "I intend to file claims for refund" but stated no grounds, whereas paragraph 10 of the letter in the case at bar read "She will claim the right to a refund" and the reasons were given. Furthermore, the Court's opinion indicates that Waters' tax was paid simultaneously with the filing of the letter with the Collector and not before, and hence the letter could not have been characterized as a refund claim.

On pages 24 and 25 of the Government's brief, a large number of cases are cited in support of the argument that the decision in the case at bar constituted a departure from established principles. On examination it will be readily seen that they are all easily distinguishable.

In *United States v. Felt & Tarrant Co.*, 283 U. S. 269, the deduction claimed in the suit was not mentioned in the claim for refund, nor in the brief or at the hearing before the Commissioner. This is not true in the case at bar.

In *United States v. Henry Prentiss & Co., Inc.*, 288 U. S. 73, the amendment was not responsive to the original request for a special assessment. In the case at bar the amendment did not depart from the original grounds stated in support of the refund.

Counsel cite *United States v. Mellon*, 39 F. (2d) 505 and on page 25 of their brief state that a so-called "claim" even though on Form 843 did not satisfy the statutory requirement" etc. This reference to Form 843 coupled

with the prior argument on page 19 of their brief tha refund claims were required to be filed on this same forn is misleading. Counsel omit to state that claims of abate ment are likewise filed on Form 843, and that in the *Mello* case the so-called claim which the taxpayer filed was, a the Bureau's suggestion, a claim of abatement to sta collection of an asserted deficiency. Claims of abatemer are not refund claims. *Rock Island & R. R. v. Unite States*, 254 U. S. 141, cited at page 12 of the Government brief. No facts or grounds were stated in the claim c abatement and the fact of overpayment was not discovere until several years thereafter. It was then asserted tha the abatement claim was a refund claim and mandamu was brought to compel payment, which the court refuse to grant. The court held that it was for the Commissione to determine whether an alleged claim of refund complie with the statutory requirements and "whether the cou would have reached the same conclusion is not the que tion." The case at bar constitutes no departure fro any established principles of the *Mellon case*. Since th Commissioner treated the letter in the case at bar as claim, the *Mellon* case would seem to be an authority support of the Court below instead of against it.

In *United Shoe Machinery Corp. v. White*, 89 F. (2d 363 (C. C. A. 1), there was no claim for refund, eith formal or informal. The District Court held a claim fo credit was not a claim for refund, 13 F. Supp. 97. *M Laughlin v. Dean Witter & Co.*, 69 Fed. (2d) 259, holdin that a closing agreement was not a claim, is not in poi since the case at bar does not involve closing agreemen

Certain letters were construed in *Livermore v. Miller*, F. (2d) 111; *Anderson v. United States*, 6 F. Supp. 85 *Pine Hill Crystal Spring Water Co. v. United States*, 58 (2d) 506; *International Arms and Fuze Co. v. Unit States*, 37 F. (2d) 771; *Philipsborn v. United States*, 53

(2d) 133; *Northwestern Natl. Life Insurance Co. v. Willcuts*, 1931 C. C. H. Vol. 3, Par. 9336; *Pratt & Letchworth Co. v. United States*, 1 F. Supp. 745; and *Peterson v. United States* (E. D. Okla.), U. S. Tax Cases 1939-2 at Par. 9521, but they all involved a different factual situation than is present in the instant case.

Thus in *Livermore v. Miller* the purpose of the correspondence with the Collector was to explain taxpayer's refusal to pay installments due on current taxes and not to claim a refund. It was not, in fact, presented to the Commissioner or considered to be a claim by the Collector. The letter in *Anderson v. United States* was likewise written to avoid payment of a proposed deficiency and the Court found that the taxpayer did not expect a refund. In *Pine Hill Crystal Spring Water Co. v. United States* the letter was merely a request for a ruling and obviously was not a claim. In *International Arms and Fuze Co. v. United States*, the letter referred to 1917 taxes, whereas suit was brought for 1916 taxes. In *Philipsborn v. United States*, the letter was not considered as a claim by either taxpayer or the Commissioner and besides contained no assertion of an overpayment or of errors in computation. The letter in *Northwestern Nat. Life Ins. Co. v. Willcuts* does not appear in the opinion, but apparently it was only a letter of protest accompanying the payment in question. In *Pratt & Letchworth Co. v. United States*, the letter which was said to amend the claim was not shown to have been accepted and considered, whereas the letter in the case at bar was accepted and treated as a claim. In *Peterson v. United States*, the letter was insufficient as an informal claim because it did not even make a statement that overpayments had been made. Hence it was treated as a letter of protest.

On page 26 of its Brief the Government argues that the Court below treated the letter as a contingent claim which

completely suspended the statute of limitations until some future date. There is no discussion in the Court's opinion, however, about any tolling of the statute of limitations. The Court below stated the issue to be "whether appellant's letter of March 24, 1925, to the Collector of Internal Revenue constituted an informal claim for refund" (R. 45) and concluded (R. 47) that the "letter was more than a protest or a statement of an intention to file a claim later in the event certain contingencies should arise." What was no doubt meant by the statement that the claim "did not mature until the March 1, 1913 value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction" was that the amount of the overpayment in dollars and cents could not be fixed until that time.

The decision below is not such a precedent as would permit taxpayers to suspend the statute of limitations as suggested on pages 26 and 27 of the Government's brief.

The use of informal claims was abolished in 1929 by T. D. 4266, VIII-1 Cum. Bull. 111 (Appendix, page 71) so that the Commissioner cannot now "be forced to consider at his peril every informal assertion to him by a taxpayer." If claims are filed stating that pertinent information depending upon the result of pending audits or litigation will be submitted in the future, then the Commissioner has the remedy in his own hands of promptly disallowing the claim if he wishes to start running the statute of limitations on commencing suit. See *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 71.

Nor, as is suggested in the foot note page 27 of the Government's brief, would there have been no necessity, if the decision below is correct, for the enactment of Section 608 (b) (2) of the 1928 Act. The time for starting suit in the case at bar was extended by reason of the Commis-

sioner's failure to reject the claim and not because of its alleged contingency. Section 608 (b) (2) of the 1928 Act is perhaps necessary to take care of cases in which claims have been rejected, since once the claim had been rejected, there was formerly no legal means of postponing the time for starting suit, even if both the Commissioner and the taxpayer were willing.

On page 27, the Government finally argues that in any event the contingency referred to in the letter never arose. It should be noted that the various excerpts quoted are all taken from Paragraph 9 of taxpayer's letter and the discussion is only appropriate to that paragraph. Paragraph 10 dealt with the situation where "for any reason a revaluation shall be had" and this occurred when the Board promulgated its opinion in the *Couzens* case.

We do not understand counsel to question the right to amend on September 24, 1928, if it is held that the letter of March 24, 1925 constituted an informal claim for refund. This was expressly permitted by T. D. 4266 VIII-1 Cum. Bull. 111 promulgated March 27, 1929 (Appendix page 71). The amendment clearly comes within the rules laid down in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 and *United States v. Factors' & Finance Co.*, 288 U. S. 89.

## II.

### *By retaining and treating the letter of March 23, 1925, as a claim for refund for a period of over ten years, the Commissioner waived any and all defects of form contained therein.*

The Commissioner is, of course, without power to waive the bar of the statute of limitations, *United States v. Garbutt Oil Co.*, 302 U. S. 528, any more than a railroad can waive the requirements of a bill of lading for the filing

of claims for damages. *Georgia, Florida & Alabama Railway Company v. Blish Milling Company*, 241 U. S. 190.

He can, however, waive the requirements of the regulations as to the particularity with which the grounds must be stated and consider a general claim on its merits. *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533.

In *Tucker v. Alexander, Collector*, 275 U. S. 228, a claim was filed on certain grounds, but on trial they were abandoned and without objection a new issue was litigated. The Circuit Court of Appeals held that a recovery on new grounds was prohibited by Section 3226 Revised Statutes. In reversing, this Court said at page 231:

> "*The statute and the regulations* must be read in the light of their purpose. *They are devised, not as traps for the unwary, but for the convenience of government officials* in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery * * *. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administration procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.*"

See also *United States v. Elgin National Watch Co.*, 66 F. (2d) 344 (C. C. A. 7th); *United States v. Humble Oil & Refining Co.*, 69 F. (2d) 214 (C. C. A. 5th); *Reynolds v. McMurray*, 77 F. (2d) 740 (C. C. A. 10th).

The Commissioner was not misled by the generality of Mrs. Kales' letter of March 23, 1925 (Affidavit, R. 31), and in none of the exhibits attached to the amended peti-

tion does it appear that objection was ever made on that score.

The Commissioner must therefore be deemed to have waived all defects arising from the noncompliance with the regulations in respect to the original claim of March 23, 1925.

## III.

### *Taxpayer's claim for refund was never rejected and suit is not barred by Section 3226 of the Revised Statutes.*

It was claimed in the motion to dismiss (R. 26) that uit was barred by Section 3226 of the Revised Statutes and error is assigned to the failure of the court below to hold that the cause of action was barred by the statute of limitations (Error No. 7, Government's Brief, page 9).

We do not understand the Government is now claiming that if taxpayer's letter of March 23, 1925, is held to be an informal claim thereafter duly amended, that there is any applicable statute of limitations that bars the suit.

Under Section 3226 of the Revised Statutes as amended by Sections 1103 of the Revenue Act of 1932 and 807 of the Revenue Act of 1936 (Appendix page 70), the time limit on starting suit is two years from the date of mailing by registered mail of notice of the disallowance of the part of the claim to which the suit relates.

No error was assigned to the Circuit Court of Appeals' decision that the Commissioner's letter of April 6, 1925, did not constitute a rejection (R. 49) and the Government does not argue the point.

It was specifically alleged in paragraph 3(n) of the amended petition (R. 12) that no notice of the disallowance of the claim had been mailed to taxpayer by registered mail, and as late as August 20, 1935, the Bureau took the

position that there was no necessity for a disallowance (R. 25, 26). Even if the letter of August 20, 1935, was considered by the court to be a rejection, the present suit was timely, being brought less than a year thereafter.

It is clear therefore, that the present suit is not barred by Section 3226 of the Revised Statutes.

## IV.

### *There was no merger of the tapayer's refund claim involved in this suit into the judgment granted taxpayer on the jeopardy assessment.*

The Government argues that the taxpayer's claim for refund of $195,710.44 is merged in the judgment secured by the taxpayer against Collector Woodworth on the jeopardy assessment of $2,627,309.05.

The rule of "merger" as here invoked is a branch of the res judicata and its application is to be tested by the same rules as apply to that doctrine. It might well be left to our later consideration of res judicata. It is, however, covered under a separate heading in the Government's brief and we therefore discuss it here. It should be noted, however, that this point was raised by the Government in its motion to dismiss (R. 27) but was thereafter abandoned. It was not pressed in the Circuit Court of Appeals. That Court said (R. 49):

> "The Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it *on a ground abandoned* in this action * * *." (Italics ours.)

The general rule is that objections not raised in the lower court cannot be relied upon in the appellate court. *Federal Trade Com. v. Pacific States Paper Trade Assn.*, 273 U. S. 52.

*Hiawassee Power Co. v. Carolina-Tenn. Co.*, 252 U. S. 341;
*Duignan v. United States*, 274 U. S. 195;
*Blair Commr. v. Oesterlein Machine Co.*, 275 U. S. 220;
*Helvering v. Minnesota Tea Co.*, 296 U. S. 378;
*Helvering v. Tex-Penn Co.*, 300 U. S. 481;
*Burnet Commr. v. Commonwealth Imp. Co.*, 287 U. S. 415;

and particularly *Helvering v. Wood*, 309 U. S. 344, 348-349, where, as here, the point had been expressly waived in the Circuit Court of Appeals.

The question of merger was first raised by the Commissioner in his letter of August 20, 1935 (R. 25). That letter proceeds on the assumption that the informal refund claim which was filed March 24, 1925 to recover an overpayment in 1920 of taxes on account of under-valuation, and which claim was amplified and perfected by the amendment of September 24, 1928, is the same refund claim which was filed June 4, 1925 to recover the jeopardy assessment of $2,627,309.05. The letter also proceeds on the assumption that the informal claim filed March 24, 1925 for the 1920 overpayment was merged in the judgment rendered for $2,627,309.05 on the jeopardy assessment claim filed June 4, 1925. Both assumptions are clearly erroneous. The claim for refund, on which the pending suit is based, was filed March 24, 1925, and amplified and perfected by the amendment of September 24, 1928, and is a separate claim and involves a separate issue from that involved in the suit against Collector Woodworth. The refund claim involved in the suit against Collector Woodworth was filed June 4, 1925.

Paragraphs 9 and 10 of the letter of March 23, 1925 clearly relate to something more than the jeopardy assessment of $2,627,309.05 with which the later suit against

Collector Woodworth was concerned. The objections to the levy of that jeopardy assessment had been particularly covered in the preceding Paragraphs 1 to 8. In Paragraph 9 the taxpayer goes further and says:

> "This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government that while it is her position that the deficiency assessment is so illegal and void as is set forth in Paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held * * * that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated * * * then this taxpayer will show and claim and insist that the valuation of $9,489.34 * * * is substantially less than the fair value of said stock on the basic date and that the said stock was clearly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34 and that, therefore, this taxpayer should recover * * * such portion of the tax heretofore paid on said transaction as may be found to have been excessive * * *."

And in Paragraph 10 the taxpayer definitely asserts her additional claim:

> "* * * yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued * * * and she will claim the right to a refund of said tax to the extent of such excess."

In the preceding Paragraphs 1 to 8, the taxpayer asserted that, relying upon the original March 1, 1913 value fixed by Commissioner Roper, she had sold the stock and could not recover it; that the Roper valuation was fixed by the Government without consultation with the taxpayer; that the proposal of the Government was that if she would sell her stock, the Government would accept

payment of the taxes computed on Commissioner Roper's valuation and that that valuation must stand; the Government had no right to change it to the taxpayer's prejudice and was estopped from reopening it and assessing a deficiency based on a new and different valuation.

When, therefore, counsel asserts that it is clear from the context of the letter that taxpayer was concerned only with the deficiency assessment, he is in error. When he asserts (Br. 17) that the judgment in the jeopardy assessment suit against Collector Woodworth "gave the taxpayer everything she demanded in her letter of March 23, 1925" and again when he asserts at page 18 "that the judgment entered in the prior litigation was fully responsive to the March 23, 1925 letter," he entirely overlooks the fact that Paragraphs 9 and 10 were asserting a claim above and beyond the claim for the jeopardy assessment of $2,627,309.95; that is a claim for such an amount of the overpayment in the original tax of $1,216,086.26 which would automatically result if it should be judicially and finally determined that the fair market value of the Ford stock on March 1, 1913 was, in fact, greater than the $9,489.34 as fixed by Commissioner Roper.

There were then in this letter two separate demands. One was for the repayment of the jeopardy assessment paid to Commissioner Woodworth. The other was for the repayment of any excessive portion of the original tax which was paid to Commissioner Grogan in 1920, and which would be determined by a revaluation of the Ford stock. The suit against Collector Woodworth involved only the jeopardy assessment. No suit could be brought against Collector Woodworth for taxes that had been paid to Collector Grogan. *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, decided October 24, 1921; *Union Trust Co. v. Wardell*, 258 U. S. 537, decided May 1, 1922. The Government properly concedes this on page 31 of its brief. It follows

that that there could be no merger of the claim against Collector Grogan in the judgment against Collector Woodworth. It is inconceivable that there could be merged in the judgment against Collector Woodworth a claim which could not be prosecuted against him. And, of course, the claim which could not be litigated in the suit against Collector Woodworth and was not there litigated would not be extinguished by a judgment against Collector Woodworth.

## V.

### *The Taxpayer has not split a cause of action.*

It is asserted that this suit and the suit against Collector Woodworth for the jeopardy assessment both involved the taxpayer's income tax liability for the year 1919 (Government's Brief, 28); that income tax liability for any one year constitutes a single cause of action; that that cause of action cannot be split and therefore the taxpayer here, having brought suit to recover the jeopardy assessment growing out of the 1919 income, cannot now bring suit asserting that she had originally over-paid the tax on that year's income.

This point has not heretofore been raised at any time in Court in the proceedings in the District or Circuit Court of Appeals. It was suggested for the first time in the petition for certiorari. We respectfully suggest that the Court should not permit the Government to now present it. It is closely related to the merger point which was abandoned in the Court below. See supra, page 43.

It is true that generally "a single cause of action or entire claim or demand cannot be split up or divided so as to make up the subject of different actions." But there are exceptions to this rule. Obviously, however, this rule cannot be applied where there is not a single indivisible claim or cause of action. Nor does this rule prevent successive ac-

tions as often as an independent cause of action arises which, because of its subsequent creation, could not be litigated in the former suit. The question is as to what constitutes an entire or single demand and the question presented on this record is whether or not the cause of action involved in this suit on a claim arising out of an overpayment of the taxpayer's income tax made in 1920 on her 1919 return is or is not a demand separate from her claim for a refund of the jeopardy assessment levied in 1925 which jeopardy assessment was an additional tax on the same 1919 income. Is taxpayer precluded from challenging any portion of her 1919 tax because she challenged the validity of the jeopardy assessment?

This rule against splitting demands stems from the general doctrine of res judicata. A judgment on the merits between the same parties is res judicata in a later suit on the same demand not only as to the precise claims that were litigated in the first suit but also as to other matters which were necessarily "incident to and growing out of that adjudication." It is true that it has been held that a tax liability for a given year is a single entity and so successive suits cannot be brought to recover separate items of a single year's liability. A year's income is said to be the indivisible entity on which the tax is computed. In certain of the cases so holding the decision rested on the fact that the claim in the second suit was identical with the claim adjudicated in the first suit. In the others it rested on the fact that the claim in the second suit was a matter that might have been properly submitted in the first suit. But this rule must yield to the qualification that the judgment in a prior suit is not a bar to any matter which could not with propriety have been litigated and determined in that prior action. None of the cases cited by counsel for the Government dispute this.

In *Lewis v. Reynolds*, 284 U. S. 281, this precise question was not involved. The court held that on a claim of refund

the question presented was whether the taxpayer had overpaid his tax. If on a redetermination of the entire tax liability, an additional tax was developed, even though it was after the bar of the statutes of limitations, and no new assessment could therefore be made, this additional liability would wipe out the amount of the refund. The taxpayer was not entitled to the refund unless he had in fact overpaid his tax. The decision went no further.

In *International Curtis Marine Turbine Co. v. United States*, 56 Fed. (2nd) 708 (Ct. of Claims), holding that a single cause of action could not be split up, the court found that the whole matter which was before the court in the second suit had been before the court in the first suit and, applying the doctrine of res judicata, the court denied the taxpayer relief.

In *American Woolen Company v. United States* (Court of Claims), 18 Fed. Supp. 783, there had been proceedings before the Board of Tax Appeals to determine plaintiff's taxes for 1922 and 1923 and the parties had filed a stipulation agreeing on the deficiency for 1922 and the overpayment for 1923. Later the taxpayer sought to recover the amount of the overpayment which the Board had applied as a credit. But the Court found that the stipulation was "such that it must be presumed that all matters in controversy between the parties with reference to the taxes of 1922 and 1923 were covered thereby and disposed of by the final order of the Board." And it applied the doctrine of res judicata. Judge Littleton, in concurring with the opinion, rested his concurrence on *Warner v. United States*, 15 F. Supp. 160 which held that a decision of the Board of Tax Appeals having before it "the precise issue involved in this case" was final.

In *Guettel v. United States*, 95 Fed. (2d) 229 (C. C. A. 8th, 1938), the taxpayer, having litigated the question of overpayment of an estate tax on the ground of the wrong-

ful inclusion of one item in the gross estate, was barred from recovering in a later case a claim based on the inclusion of another item. It was argued that the second claim was not raised in the first case because of lack of knowledge. The court held that this was no excuse and the rule of res judicata must apply.

In the case of *Chicago Junction Railways v. United States*, 10 Fed. Supp. 156 (Ct. of Claims, 1935) it appeared that the claim pressed in the later case was in fact a part of the claim that had been litigated in the previous suit and that the plaintiffs had been free to press it in that suit and had been in no way misled.

In *Bowe-Burke Mining Co. v. Willcuts*, 45 Fed. (2d) 394 (D. C. Minn., 1930) the suit was by the same plaintiff against the same defendant to recover the same taxes as had been litigated in the former suit.

In the case of *Western Maryland Railway Co. v. United States*, 23 Fed. Supp. 554 (D. C. Md., 1938), the first of the two suits was to recover the principal amount of the tax paid. The second suit was to recover interest that had accrued on the tax during the period that elapsed after it was declared payable and the time when it was in fact paid. The court said that the question was "essentially whether the doctrine of res judicata is applicable," and that the problem was two-fold; first, as to whether the present cause of action was separate and distinct from the first one in which judgment had been entered; and second, whether the parties were to be treated as not being the same, the defendant in the first suit having been the Collector and in the second suit, the United States. The court then proceeded to a consideration of whether the two claims were the same and concluded, on page 556, that:

> "the present claim for interest might well have been presented at that time, since the right to recover the interest here in controversy obviously depended up-

> on the right to recover the tax itself. Had a claim then been made, this Court could, and undoubtedly would, have entered judgment for this interest, as part of the complete refund to which the Railway Company would have been found to be entitled."

*Bertelsen v. White*, 58 Fed. (2nd) 792 (D. C. Mass., 1932) was a suit against a Collector to collect alleged overpayment of taxes for the year 1920. There had been a prior suit before the Court of Claims with respect to the 1920 tax. The Court said it was unable to see how that case could have been disposed of on its merits without the necessity of determining the validity of the 1920 tax and concluded, page 796, that:

> "the issue presented in the case at bar was included among the issues raised by the pleadings in the Court of Claims and the judgment was a final determination of these issues binding upon both parties to the action."

In all of these cases, therefore, the basis of the decision was the general doctrine of res judicata. In each case, it was found that the claim raised in the second suit had been litigated in the first suit. The fact that in any case both demands arose out of the tax liability of a single year was a circumstance that indicated that the claim pr sed in the later suit was decided in the earlier suit. But not one of these cases holds that if there should be separate causes of action arising out of the income tax liability for a single year, the doctrine as to splitting demands would apply if separate suits were brought on the separate claims. Nor do they hold that the fact that both cases arose out of the tax liability of a single year excludes entirely the possibility that the causes of action differed.

Two cases make it clear that different causes of action may arise out of a tax liability for a single year.

In *Old Colony Ry. Co. v. United States*, 27 F. (2d) 994 (D. C. Mass .1928) it was argued by the Government that a determination by the Board of Tax Appeals of the correct amount of a deficiency necessarily involved an inquiry into the total tax liability for the taxable period; that the income tax for any taxable period must be treated as an entirety and all questions as to it must be disposed of in one proceeding. But the Court held that it did not follow that a tax for a single year could be determined, assessed, collected or recovered in only one suit, pointing out that where different installments of a tax were paid to different collectors, one suit to recover the tax could not be brought.

In *Cambridge Loan & Building Co. v. United States* (Ct. of Claims, 1932), 57 F. (2d) 936, the taxpayer had been assessed a certain amount of tax plus interest and penalties. It paid the tax and interest but did not pay the penalties. It filed a claim for refund for the taxes and interest paid which was rejected with the exception of an amount which was the exact equivalent of the amount of penalties that had been assessed. The Commissioner's office, evidently confused, issued a certificate of over-assessment for that amount. The taxpayer then brought suit and recovered for the amount of its claim which had been rejected. Later it brought a suit for the additional amount for which the certificate of over-assessment had been issued. It was conceded that the taxpayer was entitled to the payment of the amount except for the fact that payment was barred because the matter had been litigated in the prior suit. The doctrine of res judicata was the only defense invoked. There was no question but that both claims grew out of the tax for the same year. The court held that the plaintiff could recover, pointing out that there was a distinct line of demarcation between allowed tax refund claims and rejected ones. It was pointed out that, as between the two, different statutes of limitations applied and the proofs that sus-

tained one were not in all respects of the same character essential to sustain the other. And so in spite of the fact that both claims grew out of the same year's tax, the court held that they were separate claims and that the actions were separate and the prior suit was not res judicata of the later one.

Are there in the present case two separate claims or two claims in which there are separate issues? We shall later advert in some detail to this question. Here we assert that there are certainly differences between the two claims. There is a difference of time. The taxpayer paid her original tax on her 1919 income in 1920. She paid the jeopardy assessment when it was levied in 1925.

But the issues under these two claims were entirely different and the proofs to establish them would be different. The issue in the suit on the jeopardy assessment was the power of the Commissioner to change the Roper valuation. That was the issue presented to the court. It was on that issue that the court decided that case. The issue in the present suit is entirely different. Plaintiff in the present suit asserts that the March 1, 1913 value was $10,000 a share and to prove that value offers the determination of the Board of Tax Appeals. Plaintiff's recovery in this suit turns upon the true March 1, 1913 value of the stock. In the absence of an acceptance by the Government of the finding of value as made by the Board of Tax Appeals, there would be an issue of fact as to that value presented. The suit on the jeopardy assessment challenged only that assessment. The determination as to its validity involved no recomputation of the original tax. The doctrine of the law which prohibits the splitting of a single indivisible demand has, therefore, no application here whatever. There is no single, indivisible demand. There are two separate demands.

It is argued on page 31 of the Government's brief that the fact that the dissatisfied taxpayer has three remedies

suggests that Congress could not have intended that more than one suit could be brought on a single year's taxes. We do not follow this reasoning. It would seem rather that the very fact that there are three remedies suggests not restrictions, but liberality. To the old remedy against the Collector there has been added the suit against the United States. Congress might take away the suit against the Collector. It did so as to a processing tax under the Agricultural Adjustment Act (*Anniston Mfg. Co. v. Davis*, 301 U. S. 337). But as to income tax collections, it still remains. Congress has added the review by the Board of Tax Appeals.

No inference can be drawn from the history and existence of these three remedies that Congress did not intend to permit a taxpayer to contest in different suits separate and distinct claims even though they spring from a single year's income tax provided only that the rule of res judicata so permits. The very variety of the remedies provided would indicate that no arbitrary restriction was intended to be imposed on the fullest opportunity for the taxpayer's contest.

It is in connection with this argument in respect to the splitting of a single cause of action that counsel for the Government concedes (Footnote, Brief p. 31) that the taxpayer was limited in her recovery against Collector Woodworth to the amount paid him. But he argues that "she should not be heard to complain that she elected to pursue the less desirable course." The inference is that if she selected the suit against the Collector in preference to a suit against the United States for a refund on the original tax, she cannot now dispute that the suit against the Collector is in fact a suit against the United States and she cannot now bring an additional suit against the United States.

This argument turns of course on the question as to whether the two suits do, in fact, involve the same demand. If there are separate demands in the two suits then she did not split her cause of action and did not take a "less desirable course" when she chose to sue Collector Woodworth for the jeopardy assessment of 1925. She still had her right to sue the United States for the overpayment in 1920.

There were very practical reasons why she should pursue her remedy against the Collector on the jeopardy assessment and await the determination of the Board of Tax Appeals on the March 1st, 1913 value of the stock, before she brought suit for any overpayment made in 1920. The voluminous record in the case before the Board demonstrates this. *Couzens's* case, 11 B. T. A. 1040. With the two remedies open and the two causes of action present, the course she selected was the obvious one to take. And it must be remembered that the rule of the cases was then clear that a suit against the Collector did not bar a suit against the United States. *Sage v. United States*, 250 U. S. 33, was decided in 1919 and its authority had not been challenged up to the date of taxpayer's letter. The course she took was then clearly justified under the law.

But surely the law does not say that if she sued the Collector on one separate demand she has given up the other. It says only that the issues litigated in the first suit cannot be litigated again in the second suit. The question then is whether the causes of action are the same in both cases. We believe we have demonstrated that they are not.

## VI.

### *The rule of Res Judicata does not bar this suit or conclude the taxpayer's contentions.*

The Government argues that the taxpayer is barred in this action by the rule of res judicata, asserting that "the earlier litigation dealt with the basis of the Ford stock and the refund sought herein turns on the basis for the identical shares" (p. 32).

This point of res judicata was not presented to the District Court or to the Circuit Court of Appeals. It was suggested for the first time in the petition of the Government for the writ of certiorari. It is closely related to the "merger" point which was specifically abandoned by the Government. We respectfully suggest the Government's contention in respect to it should not now be considered. (See supra 43.)

The assertion that the earlier suit dealt with the basis of the Ford stock and the refund sought herein "turns on the basis for the identical shares," while incorrect as applied to the separate issues and separate claims in the two suits, still perhaps requires a brief statement as to the doctrine of res judicata.

There is no dispute but what the bar of this doctrine can be applied only when the two suits in question are between the same parties or their privies. If this situation is present, and we deny that it exists here, the next question to be considered is whether or not the second suit is on the same demand as was the first suit. If the second suit is on the same demand, then the judgment in the first suit is a bar to a subsequent action and is a finality as to the claim or demand in controversy not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter

"which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U. S. 351. In some of the cases it has been said that the rule extends to matters "which might have been raised" in the former suit. These words, said this Court in *The Haytian Republic*, 154 U. S. 118, must not be misconstrued. "* * * the doctrine is that the thing adjudged includes not only the direct results of the cause of action which the judgment concludes but also all those necessarily incident to and growing out of that cause which the parties might have joined in the suit." The limitation still remains that the bar cannot be claimed except as to matters which are necessarily incident to and growing out of the first cause.

But if the second suit is on a different demand, then the first judgment is conclusive on the parties only as to the point there actually litigated and determined. *Davis v. Brown*, 94 U. S. 423, 428; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252; *Radford v. Myers*, 231 U. S. 725. Issues which were involved in the first case but were not passed on by the Court in deciding it are not res judicata. *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. R. 663. In all such cases it must appear, before the bar falls, that the first judgment determined the actual question at issue between the parties in the second suit.

The Government's contention here must, therefore, meet the test as to whether this suit is between the same parties or their privies, as was the former suit. If it is not, then there is no res judicata. If it is between the same parties, or their privies, the first question is whether or not it is on the same demand as that litigated in the former suit. We have already made some reference to this question. We submit that the second suit is not on the same demand as the former suit. The former suit was for the jeopardy assessment of $2,627,309.05. The present suit is for an overpayment made by the taxpayer in 1920 of $195,710.44. As

already pointed out, the two claims are certainly different in amount and in the time of their accrual. But it has been said that it is a proper test of whether the second suit is on the same demand as the first suit "to consider whether the same evidence would sustain both." *The Haytian Republic*, 154 U. S. 118; *Water, etc. Co. v. City of Hutchinson*, 160 F. 41, 19 L. R. A. (N. S.) 219; *Harrison v. Remington Paper Co.*, 140 F. 385, 400. This has been declared to be the best test. *Rossman v. Tilleny*, 80 Minn. 160, 81 Am. St. R. 247; *Hodge v. Shaw*, 85 Iowa 137, 39 Am. St. R. 290. Certainly the proofs in the present case necessarily involve the determination of the true March 1, 1913 value of the Ford stock. The sole issue of fact is as to that value. Taxpayer's contention in the prior suit did not require proof as to the March 1, 1913 value of the Ford stock. The only question there litigated and determined was the authority of the Commissioner to revalue that stock.

In a note to the opinion of the Circuit Court of Appeals (26 F. [2d] 178) the situation is made clear. After the trial before a jury was entered upon, the defendant admitted the truth of everything well pleaded in the declaration but this "concession did not include any statement of the actual 1913 value of the stock, if such statement there was." The Court then proceeded to direct a verdict on three grounds: (a) that the fixing of the value by the Commissioner and the sale of the stock in reliance thereon raised an estoppel in favor of the taxpayer; (b) that the original assessment and its later approvals established the value fixed beyond the power of the Commissioner, except for good cause—to reopen; and (c) that the deficiency assessment was void for lack of jurisdiction. There is in this no issue as to the March 1, 1913 value. In the Circuit Court of Appeals the Court planted its affirming decision on the second ground. It did not discuss the actual March

1, 1913 value of the stock. The scope of its finding is clearly indicated in these words in the opinion (p. 181):

> "For these and other considerations we conclude that authority to review and revise such a valuation as this for fraud, mistake, or analogous ground is reasonably to be implied from the statutes, while power thus to repudiate the former action, merely because the comissioner has changed his view (or his predecessor's) of the evidence, is not reasonably implied."

The "other considerations" had naught to do with any issue on the March 1, 1913 value.

The statement in the Government brief that "the earlier litigation dealt with the basis of the Ford stock" is, therefore, not correct in any sense pertinent to the rule of res judicata. The demands in the two cases are different and the issues litigated and to be litigated in the two cases are different.

However, if it should on any theory be said that the cause of action in the present case is the same as the cause of action in the first case, then the question would arise as to whether or not the March 1, 1913, value of the Ford stock was litigated and adjudged in the case brought to recover the jeopardy assessment, or was a "thing that was necessarily incident to and growing out of" that case so that the parties might have joined it in that suit. We paraphrase the words of the opinion in *The Haytian Republic* case, supra. Certainly, as we have pointed out, the base value of the Ford stock was not directly there determined. Nor was that value a necessary incident of that suit or its judgment. All that the taxpayer was required to establish in that suit, in order to sustain her claim, was that the Roper valuation must stand. She could not under the pleadings or the law have been accorded a judgment in excess of the amount of the deficiency assessment and so had no inter-

est in the actual March 1, 1913 value. There was no issue in the case which required her to prove the actual March 1, 1913 value of the stock. She would not have been permitted to show it for the reason that the sole question presented was whether or not the Roper value of $9,489.34 must stand.

Measured then by the rule that if the claims in the two suits are the same, the bar applies not only to the matters that were litigated but as to those which were necessarily involved or those which could have been properly adjudged in the former case, the Government's contention here must fail. The actual March 1, 1913 value of the Ford stock (this is the matter in issue in the present case) was not determined in the prior case and was not necessarily incident to that case and its adjudication.

It, therefore, becomes of no importance to determine whether the parties in the two cases are the same. In any event, the "thing adjudged" in the prior case is not the thing to be adjudged in this case.

Counsel, however, argue insistently that the parties in the two suits are the same and that *Sage v. United States*, 250 U. S. 33 (1919), which holds otherwise, is no longer the law,* or at least that the rule of that case "is distinguishable in several important respects." With this we do not agree.

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*It is argued that the common law suit against the Collector has been converted into a statutory remedy, citing *Cary v. Curtis*, 3 How. 236. The language quoted, p. 37, is from *Arnson v. Murphy*, 109 U. S. 238 (1883). *Cary v. Curtis* is now of at least questionable authority for it was pointed out in the *Smietanka* case, 257 U. S. 1, 4:

> "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, * * *. But, after an Act of Congress had required collectors to pay over such monies, it was held, *against the dissent of Mr. Justice Story*, that the personal liability was gone. *Cary v. Curtis*, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors. * * *. This, however, is not the language of the statutes and *hardly can be reconciled with the decision of this Court* in *Sage v. United States*, 250 U. S. 33, and other cases to which we shall refer." (Italics supplied.)

The doctrine of the *Sage* case has been consistently followed by this Court and has been cited with approval in numerous cases in the lower courts. It has been repeatedly relied on by the Solicitor General to protect the rights, or further the interests, of the Government. It was cited with approval in *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921). It was approved in *Graham & Foster v. Goodcell*, 282 U. S. 409, 430 (1931). In *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 312 (1932) it was expressly held that the judgment in the suit against the Collector was "not res adjudicata against the Commissioner or the United States." Both it and the *Bankers Coal Co.* case were cited with approval in *Tait v. Western Maryland Railway Co.*, 289 U. S. 620 (1933). The *Tait* case was argued on the 12th of May, 1933 and decided on May 29, 1933. On April 19, 1933 the case of *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373 was argued. It was decided May 8, 1933. The opinion in the *Moore Ice Cream Company* case should, therefore, be read in connection with the opinion in the *Tait* case, decided by a unanimous court exactly three weeks later. *Bankers Coal Co. v. Burnet* had only recently been handed down on December 5, 1932. Its opinion was also by a unanimous court. The *Moore Ice Cream Company* case is referred to by opposing counsel as "this Court's more thorough and more recent consideration of the nature of the suit against the Collector * * *." It is, of course, more recent than the *Sage* case. But it is not more recent that the *Tait* case which specifically approved the doctrine of the *Sage* opinion.

In the *Moore Ice Cream Company* case, the taxpayer had made a payment of its taxes without protest in 1923 when the law still required as a condition of the collection of a refund that the payment be made under protest. The requirement persisted until 1924, when it was abolished. The taxpayer brought its suit in 1931. The Government contended

that the rule requiring a protest survived if the payment was before the amendment. The taxpayer contended that the new rule applied to all suits begun after the adoption of the amendment even though the payment had been made theretofore. The Court held that it was the intention of Congress to remove the requirement of protest in any suit brought after the amendment irrespective of the date of the underlying payment. The Court derived this intention of Congress not only from the language of the statute but from its "history and aims." It said in substance: the Government was unjustly enriched when it "held on to moneys which had been illegally collected either with protest or without." (Opinion p. 378); the requirement of protest had not been limited to suits against a Collector but extended also to suits against the Government; so when Congress amended the statute to strike out the necessity for a protest it drew no distinction between suits against the Government and suits against a public officer; it made them subject to a common rule and made no discrimination between payments that had been made "and those to come." The Court later pointed out that the defendant Collector acted under the direction of a superior officer and his duty being imperative, he was protected by the command of his superior and was entitled as of right to a certificate converting the suit against him into one against the Government. His position could be no better if there had been a protest at the time of payment. Here the Court comes to the statement quoted by Counsel for the Government:

> "In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into Court."

Summing up the argument as to the constitutionality of the statute, the Court pointed out that there had been no change in it as to the Collector. The remedy had been enlarged against the Government but the subordinate official who is

> "brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be borne by some one else."

Granted that permission to sue the defendant Collector is merely a remedial expedient for bringing the Government into court, the so-called "relic of bygone modes of thought," i.e., the suit against the Collector, is still one of the remedies open to the taxpayer.* Justice Cardozo's language does not go so far as to say that a suit against a Collector is identical with a suit against the Government. When in the earlier portion of the opinion, it was said (page 379):

> "It did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule."

it must have been the thought of the Court that the suit against the Government and the suit against the Collector were not really one and the same. The Court could have said that no distinction could be drawn between suits against the Government and those against the Collector because they were in reality suits against the same parties. It did not do so.

The Circuit Court of Appeals of the Sixth Circuit in *Toledo Edison Co. v. McMaken*, 103 F. (2d) 72 (1939) refused to interpret the *Moore Ice Cream Company* case as overruling the *Sage* case.

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*Mr. Justice Cardozo used this language in the course of an argument (p. 379), which rested on the "fine sense of honor" of the United States in renouncing "an advantage that was felt to be ignoble" and laid down a rule for the benefit of the taxpayer. He did not consider the possibility that the Government would later use his words to prevent the litigation by the taxpayer of an issue which under the law as it stood when she brought her first suit against the Collector could be reserved for a suit against the Government.

This Court had an opportunity to overrule or criticize the doctrine of the *Sage* case in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337 (1937). It did not take it. The suit was against the Collector. The statutes had withdrawn the remedy of a suit against him. The taxpayers nevertheless brought suit and argued that they had a vested right of action against the collector to hold him to account and that the new remedies which the Act gave were not the equivalent of the right taken away. They contended that the suits they sought to maintain were really

> "personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the Collector."

The Court of Appeals held the suits were not personal, common law actions but statutory actions for a refund in which the appellee is not a real but only a nominal or fictional defendant and distinguished *Sage v. United States* and other related cases.

The opinion of the Supreme Court includes no statement as to whether there was any identity between the suit against a Collector and a suit against the United States and did not discuss the question of whether a suit against the Collector was really a personal suit at common law. It apparently brushed that distinction aside, concluding (p. 357) that the procedure authorized by the statute and substituted for the suit against the Collector provided

> "for the protection of all the legal rights of the petitioner including any constitutional right which it may be entitled to invoke with respect to the refund which it seeks."

It affirmed the dismissal by the Court of Appeals "*but upon the ground stated in this opinion.*" (Italics ours.)

It cannot be said that this case impairs in any way the ruling of the *Sage* case.

The *Sage* case was again referred to in *Lowe Bros. Co. v. United States,* 304 U. S. 302, and in connection with the *Moore Ice Cream Company* case, the Court holding that a suit against the United States would not lie in the District Court to recover taxes in excess of $10,000 unless the overpayment was collected by a Collector who, when the suit was begun, was dead or out of office.

In the still later case of *Sunshine Coal Co. v. Adkins,* 310 U. S. 381 (1940), the Court had an opportunity to express itself on the *Sage* case but was content only to distinguish it and thus indirectly to again endorse its doctrine. Sunshine Coal Company applied to the National Bituminous Coal Commission to be exempted from a tax on the ground that its coal was not bituminous coal. The Commission held otherwise. The order was reviewed in the Circuit Court of Appeals and affirmed. It was there decided that the Company's coal was in fact bituminous. The taxes had been demanded and a temporary injunction was issued to prevent their collection. Adkins, the Collector, then took the position that the decision in the earlier case against the Coal Commission was res judicata as to the status of the Company's coal and that, therefore, the Court had no jurisdiction to entertain the second suit. When the matter came to the Supreme Court, that Court held (page 402) that the taxpayer was seeking to raise the identical issue raised in the former suit

> "since its purpose is to enjoin collection of the self-same tax."

It then pointed out that where the issues in separate suits were the same, the fact that the parties were not identical was not necessarily fatal:—

> "A judgment is *res judicata* in a second action

> upon the same claim between the same parties or those in privity with them."

and the opinion continues (page 403):

> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 284-289. Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage v. United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.' *Sage v. United States*, supra, p. 37. But here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission is valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait v. Western Maryland Ry. Co.*, supra."

This is certainly an express recognition that the rule of *Sage v. United States* still stands.

Counsel say (Br. 33) that

> "the important consideration was that the United States was the real party in interest in both suits * * *."

This is not correct. There were two real or essential points; first, the issue, as to the nature of the taxpayer's coal,—this was the same in both cases; and second, the fact that the party who first determined it had the power to bind the United States in such determination.

We find but four cases in which the doctrine of the *Sage* case has been criticized or limited. One is in the opinion of the District Court in *Western Maryland Ry. Co. v. United States* discussed supra (page 50); another is the opinion of the Fifth Circuit in the case of *Anniston Mfg. Co. v. Davis*, 87 Fed. (2d) 773 (see supra 64). The *Sage* ruling was not there criticized, but it was said, page 779, that it

> "must be read as applied to the situations specifically dealt with under those decisions and the matters decided in them."

The Supreme Court, as we have pointed out, did not follow the lower Court in this respect. The Sage case was distinguished by the District Judge in *Cudahy Packing Co. v. Harrison* (Ill.) 18 F. Supp. 250 (1937), and again distinguished and limited in *Hammond-Knowlton v. United States*, (C. C. A. 2nd, 1941), 121 F. (2d) 192. It was approved in *United States v. Nunnally Investment Co.*, 36 F. Supp. 332, certiorari denied May 26, 1941.

The Government's brief argues that the *Sage* case is further distinguishable on the ground that whatever distinctions existed at the time of that decision in suits against the United States and suits against the Collector have since disappeared, asserting that the distinction so far as interest is concerned has since been eliminated by the statute and that now a Collector would be entitled to a certificate of probable cause and concluding that it is difficult to determine what the difference is "in the nature of the defenses open"; that while there may be certain formal differences between the two types of suits, there are no differences of any substance. But there are substantial differences in the incidents of a suit against the United States and of a suit against the Collector.

In a suit against a Collector in a United States District Court, the plaintiff taxpayer has a right to a jury trial

and an absolute right of appeal to the Circuit Court of Appeals. If the taxpayer brought suit in the Court of Claims against the United States, there is no absolute right of appeal and there is no constitutional right to a jury trial. *McElrath v. United States*, 102 U. S. 426. The District Court sitting in a suit brought against the United States sits as the Court of Claims. In suits in the District Court, brought under the Tucker Act, jury trials are expressly prohibited. U. S. C. A. Title 28, Sec. 41 (20).

A claim against a Collector has been held to be assignable. *Burke v. Davis*, 63 F. 456; *Masonic Country Club v. Holden*, 12 F. (2d) 951. Claims against the United States before allowance are not assignable. U. S. C. A., Title 31, Sec. 203.

There are special statutory provisions regarding allegations of allegiance applicable to suits in the Court of Claims. The State Conformity Acts apply in procedural matters in suits against the Collector but do not in suits against the United States.

Costs are recoverable as a matter of right against a defendant Collector, *DeBary v. Carter*, (C. C. A. 5th) 102 F. 130; Cf. *Treat v. Farmers Loan & Trust Co.*, (C. C. A. 2nd) 185 F. 760,—not so if the suit is against the United States. U. S. C. A., Title 28, Sec. 258; *United States v. Chemical Foundation*, 272 U. S. 1, 2[illegible]; *United States v. Worley*, 281 U. S. 339, 344; *Corn Exchange Bank v. United States*, (D. C., S. D., N. Y.) 51 F. (2d) 508.

It is clear there are still essential differences between a suit against the Collector to recover an income tax erroneously assessed and collected and a suit against the United States for the same purpose. The doctrine of the *Sage* case still has vitality.

The *Sage* case was decided in 1919. Taxpayer's suit on the jeopardy assessment was begun in December, 1925.

In the interval the Court had handed down the *Smietanka* case in 1921. The Second Circuit in *Fox v. Edwards*, 287 F. 669 (1923) had cited the *Sage* case and emphasized the three distinct remedies given to the taxpayer and had quoted it in *New York Life Insurance Co. v. Anderson*, 263 F. 527 (1920). It had been cited in the Eighth Circuit, *Coffey v. United States*, 296 F. 807 (1924), and by the Western District of Pennsylvania in *Harrison v. Lewellyn*, 28 F. (2d) 990 (1928). It was not until eight years after commencing suit on the jeopardy assessment that the *Moore Ice Cream Company* case suggested that suits against Collectors for overpayments of income taxes were anachronisms or relics of bygone modes of thought. We respectfully suggest that the taxpayer should not now be penalized for planning her course in strict conformity with the law as it stood when she sued Collector Woodworth and still protected and pressed in the Department her claim for refund for the 1920 overpayment of the original tax, appreciating always that Collector Grogan being dead, her suit for an overpayment to him would be against the United States.

## CONCLUSION

By reason of all the foregoing, the respondent contends that the decision of the court below should be affirmed.

Respectfully submitted,

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# APPENDIX

## *Statutes and Treasury Decisions Involved*

Section 252 of the Revenue Act of 1918.

> "That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Section 3226 Revised Statutes as amended by Section 1103, Revenue Act of 1932, and as amended by section 807, Revenue Act of 1936.

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun."

T. D. 4266 C. B. VIII-1 page 111.

Treasury Department

Office of Commissioner of Internal Revenue

Washington, D. C.

To all Collectors of Internal Revenue and
Others Concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (computed without regard to the filing of any so-called informal or defective claim) unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for

any purpose as a claim for refund or credit. (See e.g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1306, Reg. 65; art. 1304, Reg. 69; art. 1254, Reg. 74; Law Opinion 1116 [C. B. III-1, 350]; T. D. 4265 [page 110, this Bulletin].)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

D. H. Blair,
Commissioner of Internal Revenue.

Approved March 27, 1929.

A. W. Mellon,
Secretary of the Treasury.

# SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1941.

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| United States of America, Appellant, *vs.* Alice Gray Kales. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |

[December 8, 1941.]

Mr Chief Justice Stone delivered the opinion of the Court.

Two questions are presented for decision by the record in this case. First, was a letter written to the tax collector by respondent taxpayer and lodged with the Commissioner a claim for refund of overpaid taxes so as to stop the running of the statute of limitations against the claim? Second, did a judgment refunding taxes paid to the collector in 1925 upon profits from the sale of certain shares of stock in 1919 bar a later suit for a further recovery of 1919 taxes overpaid in 1920 to a different collector upon profits from the same transaction?

In 1919 respondent was the owner of 525 shares of the stock of the Ford Motor Company which she had acquired before March 1, 1913. In anticipation of the sale of the stock she requested and obtained in 1919 from the Commissioner of Internal Revenue a ruling that the March 1st, 1913 value of the stock was $9,489 per share. She then sold the stock for $12,500 a share and reported in her income tax return for 1919 the profit over the March 1, 1913 value thus established. In 1920 she paid the tax so computed, amounting to $1,216,086, to Collector Grogan, since deceased.

In March, 1925, the Commissioner made a jeopardy deficiency assessment against respondent for an increase of profit on the sale of the stock in 1919, on the ground that respondent had overstated the 1913 value of the stock in her 1919 tax return. Respondent paid the additional assessment, amounting to $2,627,309, to Collector Woodworth on March 24, 1925. At the same time she lodged with the collector and the Commissioner a written protest, dated March 23, 1925, against the jeopardy assessment on the ground,

among others, that the Commissioner was without authority in law to reopen and set aside the 1913 valuation of the stock as determined in 1919 by the then Commissioner, on the basis of which respondent had sold her stock. By paragraph 9 of the protest respondent also advised the collector, the Commissioner and the Government, that while it was respondent's position that the deficiency assessment was illegal and void for this and other reasons stated, if the Internal Revenue Department, the Board of Tax Appeals or any court having jurisdiction should hold that the assessment of March 1, 1913 value of her stock, made in 1919, should be vacated, set aside, reopened or reversed, then respondent would insist that the valuation fixed by the Commissioner in 1919 was less than the fair market value as of March 1, 1913, that the 1919 tax which she had paid in 1920 was correspondingly excessive and that she should recover the tax to the extent of such excess when the fair value had been determined. She added in paragraph 10 that "if for any reason a revaluation shall be had", she "will insist" that the stock was greatly undervalued by the Department and "will claim the right to a refund" of the excess tax collected.

After a claim duly filed for refund of the amount of the jeopardy assessment, paid in 1925, respondent brought suit in the district court against Collector Woodworth, which resulted in a judgment for the taxpayer for the full amount of the assessment with interest. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment, *Woodworth* v. *Kales*, 26 F. 2d 178, which was satisfied in November, 1928.

September 24, 1928, respondent filed a formal claim for refund of the taxes paid in 1919, stated to be an amendment of the claim for refund contained in her letter of protest of March 23, 1925. By the amendment respondent sought an additional refund of income taxes, paid for the year 1919, in the amount of $195,710 with interest, upon the ground that the Ford stock, as the Board of Tax Appeals had then determined in *James Couzens*, 11 B. T. A. 1040, had a March 1, 1913 value of $10,000 per share, and that she should accordingly have the benefit of this higher basis in computing her profit. At a hearing granted by the General Counsel for the Bureau of Internal Revenue on June 13, 1929, the amended claim was considered on the merits. Again in January, 1933, a member of his staff, at a conference with respondent's attorney, advised the latter that the informal claim was filed in time and was good as an informal claim.

By letter of June 4, 1935, however, the Commissioner declined to act upon it, on the single ground that because respondent's judgment for refund of the jeopardy assessment for 1919 taxes had been satisfied "the Bureau is precluded from giving further consideration in any respect to the matter of your income tax liability for the taxable year 1919." This was followed by the Deputy Commissioner's letter of August 20, 1935 to respondent, stating that "the refund claim filed in 1925 was merged into the judgment . . . and you were, therefore, precluded from filing an amendment to the earlier claim which had been finally adjudicated." The letter added "The adjudication by the court removed this matter from the realm of administrative action other than to make refund as directed by the judgment."

Collector Grogan having retired from office and having died, the present suit for refund of the overpayment of the tax claimed was brought in the district court against the United States under the provisions of § 1122(c) of the Revenue Act of 1926. This section authorizes suits in the district court for the refund of overpayment of revenue taxes even if in excess of $10,000 to be brought against the United States where the collector to whom the overpayment was made is dead or is not in office when the suit is brought. The judgment of the district court dismissing the suit on motion was reversed by the Circuit Court of Appeals, 115 F. 2d 497, which held that the letter of March 23, 1925, was a timely informal claim for refund which had been perfected by the formal amended claim filed in September, 1928, that consequently the respondent's cause of action was not barred by limitation and that recovery was not precluded by the previous judgment for recovery of the jeopardy assessment for 1919. We granted certiorari, 313 U. S. 553, upon petition of the Government, which urged that any further recovery for overpayment of the 1919 tax was barred by the judgment in the respondent's suit and recovery of the jeopardy assessment for that year, a question of importance in the administration of the revenue laws. The Government urges as grounds for reversal that if respondent's letter of March 23, 1925 be considered a claim for refund any recovery is barred by the 1928 judgment, and that in any event the letter was not a claim for refund and does not support the present suit.

*First:* Concededly recovery of the 1919 tax, paid in 1920, is not barred by limitation if respondent's letter of March 23, 1925,

be treated as a claim for refund. The Collector of Internal Revenue extended the respondent's time to make return of her 1919 income taxes for thirty days from March 15, 1920, and her letter was placed with the Commissioner within five years of the expiration of the extended time. Section 284(h) of the 1926 Revenue Act, 44 Stat. 9, provides that a claim for refund of 1919 taxes shall not be barred by a lapse of time if filed within five years from the date when the return was due. Revised Statutes § 3226, 26 U. S. C. § 1672, makes the filing of a claim for refund in accordance with the law and Treasury regulations a condition precedent to suit to recover it. Article 1306 of Treasury Regulation 65, promulgated under the 1924 Revenue Act and applicable here, provides that claims for refund shall be made upon Form 843, setting forth all the facts relied on under oath. But Treasury Decision 4266, promulgated March 27, 1929, authorizes the Commissioner to make a refund after the expiration of the statutory period of limitation, even though no formal claim has been filed before that time, in any case in which an informal or defective claim, duly filed prior to the expiration of the period of limitation and stating specifically the grounds for the refund, is perfected by the filing of a claim prior to May 1, 1929.

This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. *Bonwit Teller Co.* v. *United States*, 283 U. S. 258; *United States* v. *Memphis Cotton Oil Co.*, *supra*, 70.

In applying these guiding principles to the case in hand it is necessary to read the letter of March 23, 1925, in the light of the peculiar circumstances then well known to the Commissioner and referred to in the letter. The letter dealt with two distinct subjects. One was the jeopardy assessment which the taxpayer was

to pay and did in fact pay to the collector on the following
hen the letter in duplicate was given to the collector and the
issioner. The other, stated in paragraphs 9 and 10 of the
related to the liability of the Government for overpayments
9 taxes made to Collector Grogan in 1920 in the event that
ommissioner's 1919 assessment of the Ford stock should be
de by the courts or administrative action. In that event the
recites that the 1919 valuation was too low, the tax paid in
was too high, and asserts the taxpayer's consequent "right to
nd of said tax to the extent of such excess."

letter states correlative alternative rights on which the
ver relied. One was the challenge to the validity of
925 jeopardy assessment on the ground that the appraisal
19 of the then Commissioner was unalterable. The other
espondent's right to a refund of taxes paid in 1920 in
ent that the 1919 appraisement of the stock should be set
by the Bureau or be determined to be erroneous. Whether
ommissioner would insist upon changing the 1919 appraisal
ock, and whether in any case the Board of Tax Appeals
find a different 1913 value for the stock, were matters for
determination. When respondent filed her letter the time
which a claim for refund could be filed was about to expire,
he occurrence of the contingencies on which a recovery could
l by respondent remained uncertain. But the Commissioner
have been left in no doubt that she was setting forth her right
efund in the event of a departmental revision of its 1919
ion of her stock. Her letter was present notice that if the
tment insisted upon changing its original decision as to
913 value, she asserted that the stock had been undervalued
consequence of the undervaluation she had a "right to a
d of said [1919] tax to the extent of such excess". Her con-
g paragraph made the like assertion "if for any reason a
ation shall be had" of the Ford stock. At that time the
issioner had assessed deficiencies aggregating $31,069,000
t former Ford stockholders who had sold stock which they
quired before March 1, 1913. *See James Couzens*, 11 B. T. A.
. Respondent's amended formal claim of September 11,
only made more specific the allegations of her earlier in-
l claim by stating that the Board of Tax Appeals had found
913 value of the stock to be $10 . ) per share and by com-

puting the excess tax, the right to which had been asserted in the earlier claim.

The fact that respondent had originally stated her claim in the future tense, saying that in the event of departmental revision of the valuation of the stock she "will insist" on a higher valuation and "will claim the right to a refund", does not in the circumstances of this case lend even grammatical support to the Government's contention. Such a use of the future tense in stating a claim may, with due regard to the circumstances of making it, rightly be taken as an assertion of a present right. See *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197-8; cf. *Moore Ice Cream Co.* v. *Rose*, *supra*, 384, reversing 61 F. 2d 605. Here the claim is alternative and contingent upon future events. The statement that upon the happening of the contingency the claim will be prosecuted is not inconsistent with the present assertion of it. It is indeed an appropriate, if not the necessary phraseology for the present assertion of an alternative claim with respect to which a taxpayer in his presentation of an informal tax refund claim, should be in no less favorable position than the plaintiff in a suit at law who is permitted to plead his cause of action in the alternative. See Rule 8(e) of the Federal Rules of Civil Procedure; *United States* v. *Richards*, 79 F. 2d 797.

If the point were more doubtful than we think it is, it would be resolved by the consistent administrative treatment of respondent's letter of March 23, 1925, and the later amendment as a claim for refund. Neither the original nor the amended claim has ever been rejected as inadequate by the Commissioner or the Bureau. There has been no objection to the claim on the ground that it was informal, deficient in its content, or untimely. Acknowledgment of the letter of March 23, 1925 by the Commissioner referred to the jeopardy assessment, but made no mention of the asserted right to refund of taxes paid in 1920. After the amendment was filed in September, 1928, the claim was held under advisement by the Bureau for nearly seven years. As we have said, it was consistently treated in correspondence by the Bureau and at hearings during this period as a claim for refund. The Commissioner finally by his letters of June 4, 1935 and August 25, 1935, declined to consider the claim on the sole ground that it was no longer a subject of administrative action because "the refund claim filed in 1925 was merged into the judgment" for refund

of the tax paid on the jeopardy assessment. Not only do we think that this entire course of departmental action was an administrative construction of respondent's letter of March 23, 1925, conforming to our own interpretation of its words, but we think it was a waiver of the requirements of the regulations as to the formality and particularity with which the grounds for refund are required to be stated. *Bowcit Teller & Co.* v. *United States*, supra, 264; *United States* v. *Memphis Cotton Oil Co.*, *supra*, 70; cf. *Tucker* v. *Alexander*, 275 U. S. 228, 231; *United States* v. *Garber Oil Co.*, 302 U. S. 528, 533.

*Second:* The Government argues that the right to recover for overpayment of income taxes in any tax year constitutes a single cause of action against the Government and that the present suit by the respondent, seeking recovery of 1919 taxes, after having recovered the amount of the jeopardy assessment for the same year involved an inadmissible splitting of her cause of action. In any event it insists that no cause of action for recovery of overpayment of 1919 taxes could survive the recovery of the amount of the jeopardy assessment, since the judgment for that recovery merged all claims for overpayment of 1919 taxes and so foreclosed the present suit for additional overpayments of taxes growing out of the same transaction.

But we think these contentions disregard the statutory scheme which has been set up for the recovery from an internal revenue collector, of taxes which he had unlawfully collected. See *Sage* v. *United States*, 250 U. S. 33. Originally payment under protest to an internal revenue collector of illegally exacted taxes gave rise to a common law cause of action against the collector for restitution of the overpayment. *Elliott* v. *Swarthwout*, 10 Pet. 137, 153, 156; *Moore Ice Cream Co.* v. *Rose*, *supra*, 375, and cases cited. By the protest the collector was informed of the contention of the taxpayer and was thus precluded from relieving himself, by payment into the Treasury of the moneys collected, from liability to make restitution. *Elliott* v. *Swarthwout*, *supra*; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4. By a series of Congressional acts it was made the duty of the collector to pay to the Government the moneys collected, regardless of a protest. 12 Stat. 442; 13 Stat. 483; R. S. § 3210; 26 U. S. C. § 1761. But with imposition of this duty on the collector to pay over, the Government undertook to indemnify him upon certification by the court

either that there was probable cause for the act done by the collector or that he acted under directions of the Secretary of the Treasury or other proper officers of the Government. 12 Stat. 741, § 1. In that event no execution was to issue against him but the amount of recovery was to be paid out of the Treasury. These provisions, carried into Revised Statutes § 989, are continued as 28 U. S. C. § 842. By § 1014 of the Revenue Act of 1924, 43 Stat. 253, 343, amending Revised Statutes § 3226, the requirement for protest of the payment was abolished.

While the effect of the certificate in indemnifying the collector has been said to convert the suit against him into a suit against the Government, at least so far as the ultimate incidence of the liability is concerned, *United States* v. *Sherman*, 98 U. S. 565, 567; *Moore Ice Cream Co.* v. *Rose*, *supra*, 381, the statutory provisions have not altered the nature and extent of the claims which the taxpayer is authorized to prosecute in suits against the collector. Originally it was the payment of the illegally exacted tax which gave rise to the cause of action. It was the payment which designated the person against whom the suit might be brought and which measured the right of recovery. Payments made to one collector could not be recovered from another, and since the causes of action against the two collectors were different recovery upon one could not bar recovery upon the other.

After the enactment of legislation requiring collectors of customs to pay over to the Government duties collected under protest, 5 Stat. 348; R. S. § 3010, doubts arose whether suit could, in such circumstances, be maintained against them, since it was thought that the statutory command had relieved the collectors from personal liability. See *Cary* v. *Curtis*, 3 How. 235. But those doubts were put at rest by later acts of Congress establishing the continued right of the taxpayer to maintain a suit against such a collector notwithstanding payment over of his collections to the Treasury. 5 Stat. 727, R. S. § 3011; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 479; *Arnson* v. *Murphy*, 109 U. S. 238, 241. A like uncertainty as to the effect of the statutes requiring internal revenue collectors to pay moneys collected to the Government was resolved by this Court's decisions in *Philadelphia* v. *Collector*, 5 Wall. 720, 731; *Collector* v. *Hubbard*, 12 Wall. 1, 13. As Congress had enacted provisions for indemnification of the collector by the Government, the implication necessarily arose that

the taxpayer could maintain an action against him. See 12 Stat. 184, 729, 741; 13 Stat. 239.

The right of action thus continued is identical with that which existed before Congress had acted. Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same. It was payment to the collector which gave rise to the suit against him and limited the amount of the recovery. The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See *Sage* v. *United States, supra; Smietanka* v. *Indiana Steel Co., supra,* 4, 5.

While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed. Among its incidents are the right to a jury trial, which is not available in suits against the United States. 28 U. S. C. 41(20).

By no possibility could the respondent in the suit brought against Collector Woodworth in 1925 recover taxes paid to Collector Morgan in 1920, which she demands here. Recovery from one collector of the payment to him does not bar recovery on the different cause of action arising upon payment to the other, even though the two collections are for taxes arising out of the same transaction. *Sage* v. *United States, supra; Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 403. The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and consequences as the Government now urges, without further Congressional action.

*Affirmed.*

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.